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No. 635

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IN THE

SUPREME COURT OF THE UNITED STATES

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, STATE OF COLORADO, AND MAURICE BAUER, JOE B. LEWIS, AND CHESTER HOSKINSON, AS THE DULY ELECTED, QUALIFIED, AND ACTING MEMBERS OF SAID BOARD AND AS INDIVIDUALS AND IN BEHALF OF ALL THOSE SIMILARLY SITUATED,

Appellants,

vs.

THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, A MUNICIPAL CORPORATION, AND ROBERT B. KEATING, GERALD L. STAPP, IRVING S. HOOK, PAUL A. HENTZELL, KENNETH M. McINTOSH, GEORGE V. KELLEY, JOE BARRY, ELVIN R. CALDWELL, AND JOE CIANCIO, JR., AS THE DULY ELECTED, QUALIFIED, AND ACTING MEMBERS OF THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION,

Appellees.

JURISDICTIONAL STATEMENT AND APPENDICES

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IN THE

SUPREME COURT OF THE UNITED STATES

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, STATE OF COLORADO, AND MAURICE BAUER, JOE B. LEWIS, AND CHESTER HOSKINSON, AS THE DULY ELECTED, QUALIFIED, AND ACTING MEMBERS OF SAID BOARD AND AS INDIVIDUALS AND IN BEHALF OF ALL THOSE SIMILARLY SITUATED,

Appellants,

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THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, A MUNICIPAL CORPORATION, AND ROBERT B. KEATING, GERALD L. STAPP, IRVING S. HOOK, PAUL A. HENTZELL, KENNETH M. McINTOSH, GEORGE V. KELLEY, JOE BARRY, ELVIN R. CALDWELL, AND JOE CIANCIO, JR., AS THE DULY ELECTED, QUALIFIED, AND ACTING MEMBERS OF THE CITY COUNCIL OF THE CITY AND COUNTY OF DENVER, A MUNICIPAL CORPORATION,

Appellees.

JURISDICTIONAL STATEMENT

Come now the Appellants above named, by their counsel, and in pursuance of Rule 15 of the Rules of the Supreme Court make the following Jurisdictional Statement:

1(a). This Appeal arises from and upon the judgment of the Supreme Court of the State of Colorado, in its consolidated actions numbered 19991 and 20021, opinion in which was rendered *en banc* on May 21, 1962, rehearing denied June 11, 1962, and which is reported as THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, State of Colorado, et al.,

Plaintiffs in Error v. CITY AND COUNTY OF DENVER, State of Colorado, et al., Defendants in Error, in 372 P. 2d 152, being not yet officially reported. A copy of that Opinion is attached hereto as Appendix A.

1(b). The grounds upon which the jurisdiction of this Honorable Court is invoked are as follows:

1. This is a proceeding on appeal from a final judgment of the Supreme Court of the State of Colorado, being the highest State Court of the State of Colorado, and is taken under and in pursuance of 28 U.S.C.A. #1257, as follows:

> "Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity."

The action is one which involves the validity of constitutional provisions of the State of Colorado, and statutes of the State of Colorado, regarding the subject matter of annexation to towns and cities, and the matter of legislative apportionment between areas in the State of Colorado, it being claimed that those several Constitutional provisions and Statutes are repugnant to the Fourteenth Amendment of the Constitution of the United States, particularly with reference to the guarantees therein of equal protection of the laws, and are further repugnant to the requirements of the Enabling Act of the State of Colorado.

The Supreme Court of Colorado has held the several Constitutional provisions and statutes to be valid and not repugnant to the Constitution, treaties, or laws of the United States.

The time of appeal is submitted to be governed by Title 28, Section 2101, U.S.C.A.:

> (c) *Any other appeal* or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days. (emphasis supplied).

II. Applicable dates of proceedings in the Supreme Court of the State of Colorado are as follows:

1. The Opinion of the Supreme Court of the State of Colorado was rendered on May 21, 1962, appearing on pages 58 to 74 of the original record herein.

2. The Judgment of the Supreme Court of the State of Colorado was entered upon the opinion on May 21, 1962, appearing at pages 75-76.

3. Fifteen days are permitted for motion for rehearing under the Colorado Rules of Civil Procedure. Petition For Rehearing was filed June 4, 1962, and appears on pages 77 to 80 of the record.

4. Petition for Rehearing was denied on June 11, 1962, as appears on page 80 of the Record.

5. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of Colorado on September 7, 1962, and appears as pages 81 to 87 of the Record.

III. It is believed and submitted that jurisdiction of the appeal is conferred upon this Court by Title 28, U.S.C.A., #1257 (2), quoted immediately above, and Title 28, U.S.C.A., #2101(c), also quoted immediately above.

IV. Cases believed to sustain the jurisdiction of this Court are as follows:

The problems presented in the instant appeal are essentially problems of equal protection of the laws, under the Fourteenth Amendment to the Constitution of the United States, and as required to be embodied in the Constitution of Colorado, under the Enabling Act in pursuance of which that Constitution was authorized to be adopted. The arguments relative to jurisdiction are essentially those set forth in *Baker vs. Carr*, 369 U.S. 186, 82 S.Ct. Adv. Sheet 691, the problems relative to which were argued orally and at length before the Supreme Court of Colorado, and largely failed of consideration before that Court.

V. Several provisions of the Constitution of Colorado, and several sections of its Statutes are pertinent to the within matter:

1. Article XIV, Section 3, of the Colorado Constitution is basic to the question:

"No part of the territory of any county shall be stricken off and added to an adjoining county, without

first submitting the question to the qualified voters of the county from which the territory is proposed to be stricken off; nor unless a majority of all the qualified voters of said county voting on the question shall vote therefore."

The said Section is found in Volume 1, 1953 Colorado Revised Statutes, at page 371.

2. Article XX of the Colorado Constitution relating to the City and County of Denver, its constitution and authority, are pertinent to this issue. Those provisions are very lengthy. They may be found in Volume 1, 1953 Colorado Revised Statutes, at pages 393 to 409, inclusive. It is claimed that under these provisions, Denver, though a County, is exempt from all requirements pertaining to other Counties, and annexations to Denver, which result in disconnections of territory from the surrounding Counties, are not subject to those provisions foregoing of Article XIV, Section 3, requiring vote of the affected County. These provisions are challenged as violative of the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States. The full text of the said Article XX appears as Appendix B hereto.

3. It is contended that the arrangements permitted Denver allows its Council to alter congressional, legislative, and judicial district boundaries, in violation of the provisions of the State Constitution, and, because annexations to Denver are allowed without consent of the persons affected thereby, though like consent is required as to annexations affecting any County other than Denver, in violation of the Fourteenth Amendment to the Constitution of the United States. Pertinent Constitutional Pro-

visions include Article V, Sections 44, 45, 46, and 47 of the Constitution of Colorado, appearing in Volume I, 1953 Colorado Revised Statutes, page 307, as follows:

> Section 44. One representative in the Congress of the United States shall be elected from the state at large at the first election under this constitution, and thereafter at such times and places and in such manner as may be prescribed by law. When a new apportionment shall be made by Congress the general assembly shall divide the state into congressional districts accordingly.
>
> Section 45. The general assembly shall provide by law for an enumeration of the inhabitants of the state, in the year of our Lord 1885, and every tenth year thereafter; and at the session next following such enumeration, and also at the session next following an enumeration made by the authority of the United States, shall revise and adjust the apportionment for senators and representatives, on the basis of such enumeration according to ratios to be fixed by law.
>
> Section 46. The senate shall consist of not more than thirty-five and the house of not more than sixty-five members.
>
> Section 47. Senatorial and representative districts may be altered from time to time, as public convenience may require. When a senatorial or representative district shall be composed of two or more counties, they shall be contiguous, and the district as compact as may be. No county shall be divided in the formation of a senatorial or representative district.

4. Also applicable are Sections 4 and 15 of the "Schedule" to the Constitution of the State of Colorado,

found in Volume 1, 1953 Colorado Revised Statutes, at pages 417 and 419 respectively:

> Section 4. Duty of general assembly. — The general assembly shall pass all laws necessary to carry into effect the provisions of this constitution.
>
> Section 15. Senators — representatives — districts. — Senators and members of the house of representatives shall be chosen by the qualified electors of the several senatorial and representative districts as established in this constitution until such districts shall be changed by law; and thereafter by the qualified electors of the several districts as the same shall be established by law.

5. Also applicable is Section 125-25-39, 1953 CRS, a portion of the School District Organization Act of 1957, which may be found in Volume 8, 1953 Colorado Revised Statutes, at page 1458, and which provides as follows:

> 123-5-29. Application. — From and after the effective date of this article no school district shall be organized except under the provisions of this article, and no consolidation of existing school districts, *annexation to existing districts*, or county high school districts shall be made except as permitted under this article. (Emphasis supplied).

6. Also applicable is Article IX, Section 2, of the Constitution of Colorado, found in Volume 1, 1953 Colorado Revised Statutes, at page 335:

> Section 2. Establishment and maintenance of public schools. — The general assembly shall, as soon as

practicable, provide for the *establishment and maintenance of a thorough and uniform system of free public schools throughout the state*, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously. One or more public schools shall be maintained in each school district within the state at least three months in each year; any school district failing to have such school shall not be entitled to receive any portion of the school fund for the year. (Emphasis supplied).

7. Also applicable is the annexation statute, and particularly section 139-11-1 through 139-11-3, found in Volume 6, 1953 Colorado Revised Statutes, at pages 173 to 175, which, being rather long, are included as Appendix C attached hereto.

QUESTIONS PRESENTED BY APPEAL

1. The City and County of Denver, Colorado, exists as a municipal corporation under Article XX of the Colorado Constitution. It is a County, as other counties in the State, and, co-terminously, a city. It is physically surrounded by three other counties, Adams, Jefferson, and Arapahoe. Jefferson County is a County bordering the City and County of Denver. Article XIV, Section 3, of the Colorado Constitution requires a vote of the people of any county before part of its territory may be stricken off and added to another County. Denver has engaged in annexations, resulting in removal of property from Jefferson County and attachment to Denver, as a County. No vote has been allowed the people of Jefferson County. It is claimed that this is permissible because of the amendment to the Colorado Constitution called Article XX.

which is asserted to provide special treatment for Denver. It is asserted that such discrimination in favor of Denver and against the remainder of the Counties of the State and their inhabitants is violative of the Fourteenth Amendment. The first question here presented is whether such a delegation of authority to Denver, special in character, to change county locus of property, without vote of the people of the County affected, constitutes such a taking of property of persons in Jefferson County and such a deprivation of the equal protection of the laws as is forbidden by the Fourteenth Amendment to the Constitution of the United States, and whether Article XX of the Colorado Constitution, if interpreted to permit such a differential standard, is void as violative of the Fourteenth Amendment and of the Enabling Act of the State of Colorado.

2. School Districts in Jefferson County, as well as in other counties surrounding Denver, were permitted to appear *amici curiae* in this action, and did so. Article IX, Section 2, of the Colorado Constitution requires establishment and maintenance of a thorough and uniform system of free public schools throughout the state. The School District Organization Act of 1957 provides such a system, *and is expressly applicable to Denver.* Article XX of the Colorado Constitution provides, in Section 8 thereof, that Denver shall constitute one school district. The 1957 Act, being Section 123-5-29, 1953 CRS above quoted, specifically applying to Denver, prohibits any "annexation to existing districts" without compliance with the act. Neither in this case, nor in any case, has Denver ever complied with the Act. It is held by the Colorado Supreme Court that Denver is exempt under Article XX from this act, which is applicable to all other persons, counties, and districts in the State. Effectively, then, the Denver City Council is em-

powered to organize and reorganize the school districts of all surrounding counties, contrary to the express vestiture of such power only in the General Assembly of Colorado. The second question here presented is whether such a delegation of authority to Denver, in direct violation of statute and express constitutional provisions, constitutes a taking of property and deprivation of equal protection in violation of the Fourteenth Amendment to the Constitution of the United States, and whether Article XX of the Colorado Constitution, so interpreted to exempt Denver alone from substantive constitutional and generally operative statutory provisions on educational system, is void as violative of the Fourteenth Amendment and the Enabling Act of the State of Colorado.

3. The City and County of Denver has contended, and the Supreme Court of Colorado has effectively acquiesced in holding, that affected counties, affected quasi-municipal districts, such as the school districts, and the taxpayers in the affected counties and districts may not challenge unconstitutional annexations of land, and that, the land being uninhabited, effectively no one may challenge the annexation. Inasmuch as the bodies corporate and politic are affected in their very existence, and inasmuch as the taxpaying inhabitants are materially affected by total change in the boundaries of the units in which they live, by alteration of the political bodies of which they are a part, and by the elimination of the tax base necessary to support those units, the third question presented is whether this deprivation of the right to be heard constitutes a deprivation of due process of law under the Fourteenth Amendment and an effective elimination of the guarantees of equal protection of the laws.

4. The attempted annexations by Denver alter judicial districts, Congressional districts, and legislative districts. They alter school district boundaries, as stated above. They effectively change the entire financial structure of the State outside of Denver, and radically impair county tax bases. Power over these areas is by the Constitution expressly vested in the General Assembly. It is effectively delegated, in the case of Denver alone, to the City Council of the City and County of Denver. The powers are non-delegable powers, believed by the Enabling Act to be required to be vested in the General Assembly of Colorado. A fourth question is presented as to whether an interpretation of Article XX of the Colorado Constitution which permits the City and County of Denver and its Council effectively to change Congressional Districts, to alter legislative districts, to amend judicial districts, and generally to affect the financial and political rights of the citizens of Adams, Jefferson, and Arapahoe Counties constitutes an improper discrimination in favor of the City and County of Denver and its inhabitants in such manner as to constitute a deprivation of the equal protection of the laws guaranteed other inhabitants of the State by the Fourteenth Amendment.

5. In argument before the Supreme Court of Colorado primary attention was given to the decision of this Court in *Baker vs. Carr*. The United States Census for 1960 demonstrates that although Denver is in the center of a rapidly-growing metropolitan area, its own rate of growth is slow. From 1950 to 1960, Denver increased in population only 18.8%. Colorado as a whole increased 32.4%. Jefferson County increased in the same period by 129%; Arapahoe County by 117.6%; and Adams County by 199%.

Denver's population in 1960 was 493,887. Jefferson, Adams, and Arapahoe Counties had 127,520, 120,296, and 113,426 persons respectively, or a population 75% that of Denver, and so rapidly growing as shortly to exceed Denver.

Based on 1960 census, each state Senator should represent 51,113 persons. In Denver, having 8 senators, each represents 61,736 persons. In Adams, Jefferson, and Arapahoe Counties, each having 1 Senator only, and an aggregate of 3, the number of persons represented by a senator is 120,296, 127,520, and 117,134 respectively. Denver is favored over its neighbors by 2 to 1 or better.

In the House of Representatives, Denver has 17 seats, and the three surrounding counties only 6 seats. There is again a population-based differential of more than 2 to 1.

Moreover, the differentiation between Denver and its surrounding counties and the State as a whole is even more violent, in some cases a 9 to 1 differential existing. In Huerfano County, the most badly over-represented, a representative is elected by 7,200 persons. In Jefferson County, the most under represented, it requires 63,760 persons to elect a representative.

There is presented, then, as a Fifth Question the problem whether a system wherein these differentia exist, and wherein the legislature, though manifestly required by the Constitution, and particularly Article V, Section 45, quoted above, has intentionally and purposely failed for more than 30 years to provide any real apportionment, and has failed since 1885 to obey the mandatory requirement of the State Constitution, and wherein a marked differential in

favor of Denver, which is over-represented by 2 to 1 as opposed to Jefferson County, exists in law, such condition constitutes, under the criteria of *Baker vs. Carr*, a violation of the equal protection of the laws accorded by the Fourteenth Amendment.

6. The serious problems of apportionment were argued to the Colorado Court, as was the effect of *Baker vs. Carr*, in this action. At the same time, there was pending before the Colorado Supreme Court the direct issue of apportionment in the case of In The Matter of LEGISLATIVE REAPPORTIONMENT. Harold Stein; etc., Petitioner, v. The GENERAL ASSEMBLY OF the STATE of Colorado et al., Respondents, No. 20240 in the Colorado Supreme Court, decided en banc July 6, 1962, reconsideration denied July 12, 1962, not yet officially reported, and appearing in 374 P. 2d 66, a copy of the opinion in which is attached hereto as Appendix D.

The Colorado Supreme Court did not even discuss, except in the sharply dissenting opinions of several of the Justices, the problem of the Fourteenth Amendment in these regards.

That fact is particularly noted by the Three-Judge United States Court convoked to hear the same problems in the case of *Lisco, et al. vs. McNichols* and *Myrick, et al. vs. General Assembly*, Consolidated Nos. 7501 and 7637, in the United States District Court for the District of Colorado, Memorandum Opinion in which was issued on August 10, 1962, and is appended to this presentation as Appendix E. In that case, the United States Court noted: "The population statistics presented by plaintiffs and challenged by no one, show the disparities we have here-

tofore noted. They are of sufficient magnitude to make out a *Prima facie* case of invidious discrimination which rebuts the presumption."

There has been in the face of this manifestly unconstitutional situation elected a new General Assembly, taking office in January, 1963, which will be asked almost certainly to pass upon Denver requests for even further amplified annexation power. The Sixth Question, then, is whether in view of the admitted illegality of Colorado apportionment, and invidious discrimination in the Colorado Legislature, as determined by both the Colorado Court and the United States Court, the Appellants here are deprived of fundamental equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The City and County of Denver is a territorially small County, having a substantial population, and surrounded by the counties of Adams, Jefferson, and Arapahoe. Population increase in Denver has been in the last decade at less than half the rate of the State as a whole. Population increase in the surrounding counties has been at rates ranging from 117% to 199%. Denver had in 1960 a population of 493,887, and the three surrounding counties a population of 361,242.

Most of the population of the tri-counties resides in a narrow belt of heavily urbanized, industrialized, and commercial properties close to the boundaries of Denver. The substantial part of the tax base of each of the surrounding counties, providing the financial means for the

performance of the governmental functions imposed upon those counties, lies in that urbanized area.

Seeking new tax sources, Denver has for some years been engaged in a campaign to absorb the tax base of the surrounding counties by annexation.

The Colorado Constitution expressly prohibits removal of territory from one county and addition to another except by vote of the people of the county from which removal of territory is essayed. The Colorado Constitution also creates, by Article XX, Denver as a City and County, and provides that it may annex as a city. Any annexation to Denver removes property entirely from the surrounding County and makes it a part of Denver as a County, without vote as required by the Constitution. This happens and can happen nowhere but in Denver.

Denver by Article XX is a single school District. Article IX requires uniform school legislation. The Act of 1957 creates that legislation and by its terms applies specifically to Denver. Denver has never pretended compliance with the 1957 Act, but takes into its school district, and out of the Districts in the surrounding counties, each piece of annexed property.

In like manner, legislative district boundaries, Congressional district boundaries, and judicious districts boundaries, which are required to be fixed uniformly and by the legislature, are effectively fixed by the City and County of Denver and its Council.

Denver is represented in the legislature on a favored basis, in each house, of more than 2 to 1 over the sur-

rounding counties. The Legislature, though affirmatively required to reapportion under the Constitution, has failed in this duty entirely for nearly 30 years, and has substantially disregarded the Constitutional requirements since the year 1885. Some differentials in the State are as radical as 9 to 1 to the disfavor of the subject Jefferson County.

In the light of this situation, Denver has endeavored in these consolidated cases to annex two substantial tracts of land in Jefferson County. Those tracts are important subdivision lands, are a part of the tax base of Jefferson County, and are an integral part of the tax base of the School District in Jefferson County.

Those annexations were challenged in the County Court for the County of Jefferson, in the manner provided by the statute. Complaints were filed in each case by the then Boards of County Commissioners (who under Colorado law are the County in its corporate capacity), and who filed representatively, as well, as individually. Each action was instituted against the annexing City and County of Denver and its then Council and the members thereof.

The Complaints appear in the record (pages 3 to 6 and 16 to 20, respectively).

In each Complaint, the fact of the annexations is set forth. In each it is asserted that as a result of the purported annexation, the boundaries of Jefferson County are changed, depriving its citizens of the benefit of taxation of the area; the boundaries of the Second Congressional District of Colorado are changed, contrary to the

provisions of Section 44, Article V, of the Colorado Constitution; there has been no election held as required by Article XIV, Section 3, of the Colorado Constitution; there is a claim that Denver is exempted from these uniform requirements by Article XX of the Colorado Constitution; and that if this is the case, then Article XX is void as in violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies the equal protection of the laws guaranteed to citizens of Jefferson County.

In each case there were filed Motions (pages 7-8, 21 and 22). These Motions requested an order dropping the Board of County Commissioners as party plaintiff because they have no legal right to sue as an aggrieved party; dropping the individuals as Plaintiffs because they have no rights under the Constitution of the United States or the Constitution and laws of the State of Colorado as citizens of Jefferson County; for orders preventing them from suing on behalf of affected citizens representatively; and for dismissal, on the ground of failure to state claim on which relief could be granted.

The Trial Court made no findings of fact, it made no conclusions of law, and it wrote no opinion of any kind in either case. In each it entered an order (pages 9 and 24), in which it was ordered that "as a matter of law the motion should be sustained", and as a result of which it was ordered that the complaint be dismissed and motion for new trial be dispensed with.

There were no trials, and no evidence was taken.

There is substantially no record in the Court below.

which did not make one, and there is no indication at all as to why in point of fact or law that tribunal ruled as it did, since it failed to find facts, conclude law, or write an opinion, despite the overwhelming public importance of matters involved.

The cases were duly taken upon writ of error to the Supreme Court of Colorado where, by orders properly appearing in the record they were consolidated. Briefs were filed, and the Court also admitted *amicus curiae* briefs on behalf of various individuals and bodies corporate or politic interested in the results.

While these cases were proceeding upon error, this Court had occasion to determine the case of *Baker vs. Carr*, involving the problem of legislative apportionment in the several states and its bearing upon the questions of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

The Briefs of the Plaintifs-in-Error and of the Amici Curiae in great detail set forth the problems under the Fourteenth Amendment. *Baker vs. Carr* was specifically argued orally before the Court, much of the oral argument session being devoted to that problem.

At the same time, there was pending before the Court the directly presented matter of reapportionment in the case of *Stein, etc. vs. General Assembly*, 374 P. 2d 66, referred above, in which the Colorado Court took jurisdiction under the constitutional powers of original jurisdiction, issued a show-cause order, and entered an opinion, attached as an appendix hereto, deferring any action until June, 1963. There is a strongly dissenting opinion. The

illegality of present reapportionment is recognized throughout, but the majority opinion does not choose to recognize the applicability of the Fourteenth Amendment even in the direct light of *Baker vs. Carr*.

No effective action having, then, been taken upon the matter of reapportionment by the Colorado Court, the matter was presented to the United States District Court in the cases of *Myrick, et al. vs. General Assembly*, No. 7637, consolidated with *Lisco vs. McNichols*, No. 7501, opinion in which is attached as an appendix.

The United States District Court took jurisdiction, stating:

> " * * * Baker vs. Carr (369 U.S. 186, 82 S. Ct. Adv. Sheet. 691) holds that a claim such as the present one, based as it is upon alleged denial of equal protection of the laws arising from the operation of a state statute creation disproportionate legislative representation, constitutes a judicial issue; that the plaintiff in such case asserts a right cognizable by a federal district court. This decision eliminates any doubt as to the jurisdiction of this Court to hear and determine the cause. The argument of the Attorney General that the Colorado Supreme Court has preempted jurisdiction by first hearing the controversy is without merit in view of the fact that THE SUPREME COURT OF COLORADO HAS REFRAINED FROM EVEN CONSIDERING THE ISSUE OF INFRINGEMENT OF THE PLAINTIFFS' FEDERALLY GUARANTEED CONSTITUTIONAL RIGHTS."

In the case at bar, the Supreme Court of Colorado has

effectively ignored the Plaintiffs' federally guaranteed constitutional rights. Its opinion, attached as an appendix hereto, really stands only for the proposition that Article XX was adopted subsequent to others portions of the Colorado Constitution; therefore supersedes them if in conflict; must be broadly interpreted; and must allow to Denver the special powers it purports to allow.

The Court finds in essence in its opinion as follows:

1. That Article XX modifies Article XIV, Section 3, of the Colorado Constitution, exempting Denver from the requirement that detachment of territory from a County be voted upon by the electors of the County effected.

2. That the equal protection clause of the Fourteenth Amendment does not relate to equality between areas, and territorial uniformity of the operation of the constitution is not a constitutional pre-requisite. The endeavor is made to state that the fact that individuals within a territory may suffer deprivation because of a segregation out for special treatment of another territory, is merely a treatment of "territory", and the people must be disregarded.

3. That municipalities and counties exist only for public convenience in administration, and accordingly may be treated in such manner as the State wills, without regard to equality of treatment, and that accordingly there may be no action by the one body officially to question the illegality perpetrated by another body. "Insofar as these suits were instituted by the Board of County Commissioners of Jefferson County in their official capacity, each was properly dismissed."

4. There is then an endeavor to justify the reasonableness of the discrimination in favor of Denver on "geographical and historical conditions." There appear in the record no evidences of a geographical or historical basis for differentiation. AND THIS IS QUITE CONSONANT WITH THE USUAL CIRCUMSTANCES OF THE CASE, SINCE *THERE IS NO RECORD OF FACTS*, and no finding of fact below.

5. There is a categorical statement that though there is an effect on legislative, judicial, Congressional, and school districts, accomplished by the Denver Council, this is not an "illegal delegation".

6. Finally, it is admitted that there is a total failure to comply with the requirement of the uniform statute on school district changes, and simply a statement that the statute must yield to the special case of Denver.

The entire decision specifically denies that there are any rights of citizens to protection against such differentiation in favor of Denver protected by the Fourteenth Amendment. The decision is a square repudiation of the effect of the Fourteenth Amendment in the circumstances, and a holding that Denver and its citizens may be favored in each of the many ways indicated, and none may challenge the differentiation.

A Petition for Rehearing was filed (pages 77-80 of the Record), limited to three pages as per the Colorado Rule in such case provided.

That Petition pointed out that "There is no proper basis of classification involved at all, but a simple exemp-

tion of Denver, a County, from the requirement applicable to all other counties; with the result that the People of Denver are given a substantial right not allowed other persons in this State, and the City Council of Denver effectively is allowed to redistrict the State as to its General Assembly, to change Congressional Districts, to alter judicial districts, and generally to interfere with the personal and political rights and freedoms of persons in other parts of the State and particularly in Adams, Jefferson, and Arapahoe Counties, immediately adjoining Denver".

It was specifically pointed out that no recognition was given, or even mention made, of *Baker vs. Carr*, though argued at length to the Court and the principal matter of its discussions on oral argument.

The statistical data concerning under-representation of the tri-counties as compared with Denver was set forth.

The Petition was denied without comment.

SUBSTANTIALITY OF GROUNDS

The action here brought upon appeal falls squarely within the provisions of Section 1257(2), quoted above. There is in the proceeding below directly drawn into question the validity of the annexation procedure, both statutory and constitution, of the State of Colorado, and ultimately there is drawn into question the validity of Article XX of the Colorado Constitution itself, if it purports to create a specially privileged area, with specially privileged citizens, represented differentially in the State Legislature from other and surrounding citizens, and given a right, for special and local reasons, to impose their will

to the detriment of the fundamental political and personal rights of other citizens of the State of Colorado.

The essence of this problem is involved in the matters essentially argued in the case of *Baker vs. Carr.*

This action involved in essence an endeavor by inhabitants of Tennessee in the United States District Court to claim that by the statute of Tennessee apportioning members of the General Assembly among the 95 counties of that State that the plaintiffs and others similarly situated were denied equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States *"by virtue of debasement of their votes."*

The Federal District Court held that it had no jurisdiction, and that no claim for relief was granted, much as was held by the County Court below. The Supreme Court accepted jurisdiction, and held that the dismissal was erroneous, remanding the cause for trial.

This Court discussed the Tennessee standard for allowance of representation, and remarked upon the contention that because of changes in population location, the statutes became from the time of last revision "unconstitutional and obsolete." The clear facts in Colorado indicate precise such an unconstitutionality and obsolescence, together with a situation of a kind of "City-State" erected in the center of Colorado, and with power apparently to negative the civil rights of any citizen living outside its boundaries, under a special power conferred only upon those citizens living within it. Thus, this slow growing and stagnant part of the community is given dominance over

and strong advantage over the viable part of the community.

This Court held "(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes. Beyond nothing that we have no cause at this stage to doubt that the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial."

Formerly it was contended, as the Colorado Court has found at Denver's instance below, effectively that matters of this kind are "political" in nature, so that the Courts may not take cognizance of them. Such a matter involves a clear evasion of the basic problem. The Court in *Baker vs. Carr* found specifically that the cause presents no nonjusticiable "political question", but a fundamental question of personal and political rights. "Their constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's constitution or of any standard, effecting a gross disproportion of representation to voting population. *The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties.*"

It is precisely this same variety of injury of which Plaintiffs here complain, a totally irrational favoring of Denver and its inhabitants over every other inhabitant and every other area of the State of Colorado, in the face of express prohibitions in the Colorado and Federal Constitutions against such favor.

The Supreme Court in *Baker vs. Carr* put to rest the "political" argument thus: "Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection 'is little more than a play upon words' *Nixon vs. Herndon*, 273 U.S. 536, 540. 'Rather,' it is argued that apportionment cases, whatever the actual wording of the complaining, can involve no federal constitutional right except one resting on the guaranty of a republican form of government and that complaints based on that clause have been held to present political questions which are not justiciable.

"We hold that claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decision of cases involving that clause."

A basic kind of standard is set out by the Court: "The question here is the consistency of state action with the Federal Constitution. We have no question, decided or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards

are lacking. Judicial standards, under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on particular facts they must, that a discrimination reflects *no policy*, but simply arbitrary and capricious action."

It is submitted that double standard of rights developed in Colorado, together with an absolute refusal of its legislature over long periods of time to grant to the mass of persons living in the affected area proper legislative representation, effectively deprives those persons of their most basic civil rights, and places their fate in the local City Council of the City and County of Denver, which is fundamentally violative of federally guaranteed right.

The glaring nature of the disparities which exist is pointed out by the United States District Court in the memorandum attached as an appendix.

For many years there have developed situations in the States in which irrational favoring of rural over urban voters, and of urban voters over the newly developing suburbs have been marked. *Baker vs. Carr* opened a remarkable and useful channel of ventilation into that stagnancy. It is respectfully submitted that the problems presented in the case at bar are such as to justify jurisdiction in this court and present questions so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution, particularly in view of the fact that no trial upon the merits has ever been allowed here, no facts have been permitted to be adduced, no findings of fact or conclusions of law have ever been made, and the Colorado Supreme Court has apparently

merely hypothesized in vacuo and has disregarded a situation which the Federal Courts in like instance have found prima facie void and violative of the basic federal rights of Colorado citizens.

ATTACHMENTS

There are attached hereto copies of the opinion of the Court below, the Colorado Supreme Court, together with copies of the opinions of that Court relating directly to reapportionment, and the memorandum of the opinion of the 3-judge United States District Court on the same subject.

For all of these reasons, it is most respectfully submitted that this Honorable Court has jurisdiction of the subject matter of this action and should allow plenary consideration, on brief and argument, hereof.

Respectfully submitted,

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Appendix A

The BOARD OF COUNTY COMMISSIONERS OF the COUNTY OF JEFFERSON, State of Colorado, et al., Plaintiffs in Error,

v.

CITY AND COUNTY OF DENVER, State of Colorado, et al., Defendants in Error.

Nos. 19991 - 20021.

Supreme Court of Colorado

En Banc

May 21, 1962.

Rehearing Denied June 11, 1962.

SUTTON, Justice.

Plaintiffs in error, the Board of County Commissioners of Jefferson County, State of Colorado, brought two separate actions in their official capacity on behalf of the people of Jefferson County, and on their own behalf as residents, citizens, landowners, electors and taxpayers of Jefferson County, and as a class action on behalf of those similarly situated. They will be referred to as plaintiffs. Defendants in error are the City and County of Denver and the respective members of the Denver City Council, and will be referred to as defendants.

Plaintiffs challenge the validity of two annexations of land in Jefferson County to the City and County of Denver. Both suits were filed in the County Court of Jefferson County and were consolidated by this court because of questions of fact and law common to each. The principal

issue is that land annexed to Denver is detached from the county from which it is taken, thereby rendering ineffective county tax planning and altering judicial, legislative, school and congressional district boundaries, all without state legislative action or a vote of the people. No annexations to other cities of the state create such challenging issues.

The facts are not disputed and can be briefly stated. Pursuant to C.R.S. '53, 139-11-3, certain landowners in Jefferson County petitioned the Council of the City and County of Denver for the annexation of their lands to Denver. Defendants approved the annexation petitions and, after giving public notice of the petitions, adopted ordinances annexing the territory in question to the City and County of Denver. Thereafter plaintiffs commenced these actions as persons aggrieved by the annexations under C.R.S. '53, 139-11-6.

The complaint in case No. 20021 was substantially similar to case No. 19991 and alleged in pertinent part as follows:

> "8. That as a result of said purported annexation, the boundaries of the County of Jefferson are changed, thereby depriving the citizens of Jefferson County of the benefits from the taxation of said annexed area.
>
> "9. That as a result of said purported annexation, the boundaries of the Second Congressional District, State of Colorado, are changed contrary to the provisions of Section 44, Article V, Colorado Constitution.
>
> "10. That no vote of the qualified voters of the

County from which the territory is proposed to be stricken off was held as provided by Section 3, Article XIV of the Constitution of the State of Colorado.

"11. That as a result of said purported annexation the boundaries of the Eighth State Senatorial District and of the Jefferson County House of Representatives Legislative District are changed contrary to the provisions of Sections 46 and 47 of Article V of the Colorado Constitution.

"12. That as a result of said purported annexation the boundaries of the First Judicial District of the State of Colorado are changed contrary to the provisions of Section 14, Article VI of the Colorado Constitution.

"13. That as a result of said purported annexation the boundaries of School District R1 of Jefferson County, State of Colorado, are changed contrary to the provisions of C.R.S. '53, 123-8-1 et seq., which sections are the ones by which School District R1 of the County of Jefferson was created.

"14. That said ordinance was purportedly enacted pursuant to Chapter 139, Article 11, Section 3 of 1953 Colorado Revised Statutes, and under the purported authority of Article XX, Section 1, of the Constitution of the State of Colorado, which allegedly gives the City and County of Denver power to annex territory without a vote of the qualified voters of the county from which the territory is proposed to be stricken off.

"15. That Article XX, Section 1 of the Constitution of the State of Colorado which purports to permit the City and County of Denver to annex territory

of another county without submitting the question to the qualified voters of the county from which the territory is proposed to be stricken off is repugnant to Article XIV, Section 1 of the Constitution of the United States in that it denies equal protection of the laws to the citizens of Jefferson County.

"16. That by virtue of the foregoing, the ordinance purportedly annexing the above described area is unconstitutional and null and void of no effect.

"17. That by virtue of the foregoing, the plaintiffs, and others similarly situated, are and have been aggrieved by such annexation proceedings.

"WHEREFORE, Plaintiffs pray that the annexation ordinance of the City and County of Denver be declared contrary to the provisions of the Constitution of the United States, be declared null and void and of no force and effect, and that the City and County of Denver, its officers and agents be enjoined from exercising any jurisdiction or authority over the persons or property within the area described in said petition, and that the area involved herein be declared to be part of the County of Jefferson, State of Colorado."

In both cases defendants filed motions to dismiss, alleging in essence that plaintiffs had no legal capacity to sue under C.R.S. '53, 139-11-6, and that the complaint failed to state a claim upon which relief could be granted. The court granted the motions, dismissed the actions and plaintiffs are here by writs of error seeking reversal. Pending determination of the causes on writ of error, we granted leave to various members of the bar to appear as amici curiae.

In seeking reversal of the judgments of dismissal plaintiffs advance extensive arguments which we summarize below. They urge that:

1. Article XIV, Section 3 of the Colorado Constitution requires a vote of the qualified electors of the county from which land is sought to be annexed, and an approval of the annexation by a majority of such voters voting on the annexation. Article XX, Section 1, which provides for annexations to the City and County of Denver, does not purport to render Article XIV, Section 3, inapplicable to such annexations. Thus a majority vote of the voters in Jefferson County was necessary in order to validate the annexations in these cases.

2. If in fact Article XX, Section 1, does render Article XIV, Section 3, inapplicable to annexations to the City and County of Denver, then Article XX, Section 1, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

3. The annexation provisions of Article XX, Section 1, have the effect of vesting in the City Council of Denver the power to alter congressional, legislative, judicial and school district boundaries. As such it violates Article V, Sections 44, 45, 46 and 47, and Article VI, Section 14 of the Colorado Constitution which vest congressional, legislative and judicial districting in the general assembly, and the Colorado School District Act as set forth in C.R.S. '53, 123-25-39. In addition Article XX, Section 1 violates the Fourteenth Amendment to the United States Constitution as an improper delegation of legislative power to the Denver City Council.

[1]. In considering plaintiffs' first argument we note

that Article XX, Section 1 of the Colorado Constitution provides inter alia as follows:

> "The general annexation and consolidation statutes of the state shall apply to the city and county of Denver to the same extent and in the same manner that they would apply to the city of Denver if it were not merged, as in this amendment provided, into the city and county of Denver. Any contiguous town, city or territory hereafter annexed to or consolidated with the city and county of Denver, under any of the laws of this state, in whatsoever county the same may be at the time, shall be detached per se from such other county and become a municipal and territorial part of the city and county of Denver, together with all property thereunto belonging."

We also note that Article XX, Section 8 provides that:

> "Anything in the constitution of this state in conflict or inconsistent with the provisions of this amendment is hereby declared to be inapplicable to the matters and things by this amendment covered and provided for."

This court has dealt with this same question in the past, and no good reason appears for an extended discussion here. We merely state, once again, that Article XX, Section 1, must be construed as modifying and limiting Article XIV, Section 3, insofar as a proposed annexation of territory to the City and County of Denver is concerned. Thus, annexations of such territory to the City and County of Denver can be effected under the statute without the consenting vote of the majority of qualified voters of the county from which the territory is detached. People ex rel

Simon, District Attorney v. Anderson et al., 112 Colo. 558, 151 P.2d 972 (1944), and see Simon et al. v. County of Arapahoe et al., 80 Colo. 445, 252 P. 811 (1927).

This brings us to the second contention of plaintiffs that Article XX, Section 1, in granting such powers of annexation to the City and County of Denver, violates the Fourteenth Amendment to the United States Constitution in that it denies equal protection of the laws to the other counties and citizens of such counties in Colorado.

[2,3] As to the claim that Jefferson County, by reason of Denver's action, is denied the equal protection of the law, we note that the Supreme Court of the United States has only recently stated that "* * * the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite." McGowan et al. v. Maryland, 366 U.S. 420, 427, 81 S. Ct. 1101, 1106, 6 L. Ed. 2d 393 (1961); see also Bowman v. Lewis, 101 U.S. 22, 25 L.Ed. 989 (1880) and Salsburg v. Maryland, 346 U.S. 545, 551, 74 S.Ct. 280, 98 L.Ed. 281 (1954). Plaintiffs' argument disregards the fact that municipalities and counties exist for the convenient administration of government and are merely instruments of the state, created to carry out the will of the state. E. g., Railroad Company v. County of Otoe, 83 U.S. 667, 676, 21 L.Ed. 375 (4872); Town of Mount Pleasant and Town of Caledonia v. Beckwith, 100 U.S. 514, 25 L.Ed. 699 (1880); The People ex rel. Elder, as Treasurer of the City and County of Denver v. Sours, 31 Colo. 369, 383-84-85-86-87, 74 P. 167 (1903). It follows that the equal protection clause of the Fourteenth Amendment was not designed to protect state instrumentalities against state action, much less against the constitutional

right of the people * * * to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness * * *" Colo. Const. Art. II, Section 2; see also Williams, etc, v. Mayor, etc., 289 U.S. 36, 40, 53 S.Ct. 431, 432, 77 L.Ed. 1015 (1933), wherein it was held that "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator. (Citing several previous cases)." And see: Hunter v. Pittsburg, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907), where it was said: "The State, therefore, at its pleasure may * * * expand or contract the territorial area (there of a city), unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. * * * The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it."

Insofar as these suits were instituted by the Board of County Commissioners of Jefferson County in their official capacity, each was properly dismissed.

[4] We next consider the question of whether Article XX, Section 1, of the Colorado Constitution denies the equal protection of the laws to the individual plaintiffs as residents, citizens, landowners, electors and taxpayers of Jefferson County.

In Hunter supra the court ruled upon a Pennsylvania statute (53 P.S. § 221 et seq.) which provided for the union of contiguous cities by means of a majority vote of qualified voters in both cities. It was argued by those opposed to the merger that such a statute deprived the citizens of the annexed city of their property without due process of law by subjecting their property to the burden of additional taxation resulting from the consolidation of the two cities. The court disposed of this argument in the following language, which is particularly appropriate here:

> "Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and *there is nothing in the Federal Constitution which protects them from these injurious consequences.*" (Emphasis added.)

[5] Even if there existed some constitutional restraint in the maintenance of county boundaries, the fact that the annexation provisions of Article XX, Section 1 apply to the City and County of Denver to the exclusion of other counties would not, on that basis alone, constitute a denial of equal protection of the laws to the people of Jefferson County. The classification under Article XX, Section 1, is based upon geographical and historical conditions peculiar to Denver as a capitol city and regional commercial center, and is neither arbitrary nor unreasonable. A classification is not violative of equal protection merely because it is limited in the object to which it is

directed or the territory within which it is to operate. Hayes v. Missouri, 120 U.S. 68, 71, 7 S.Ct. 350, 30 L.Ed. 578 (1887).

This brings us to the final contention of plaintiffs that the annexation provisions of Article XX, Section 1, vests in the City Council of Denver the power to alter congressional, legislative and judicial district boundaries in violation of Article V, Sections 44, 45, 46 and 47, and Article VI, Section 14 of the Colorado Constitution, and in violation of the Fourteenth Amendment to the United States Constitution; as an improper delegation of legislative power. It is also urged that this alleged delegation of power under Article XX, Section 1, to the City Council of Denver violates the Colorado School District Act.

[6] These contentions are based on the assumption that Section 1 of Article XX delegates to the City Council of Denver the power to alter at will the congressional, legislative, judicial and school district boundaries. However such assumption is erroneous. Annexations to Denver are the only time when this occurs and these acts are the product of the free choice of the majority of statutorily authorized persons in the district seeking annexation. The City Council of Denver does not initiate the annexation proceedings; it merely accepts or rejects the annexation petition presented, subject to other statutory requirements. We perceive no constitutional violation of the rights of the individual plaintiffs by this procedure.

It is true that annexations to Denver result in altering congressional districts. This, however, is not because of Article XX, Section 1, but because of Article V, Section 44, of the Colorado Constitution which provides that the

general assembly shall divide the state into congressional districts. The general assembly has so acted and has chosen county boundaries as the basis of division. C.R.S. '53, 63-4-1. That body still retains the power to change the congressional districts merely by changing the basis of division. There is nothing in Article XX, Section 1, which operates as a limitation upon the power of the general assembly to choose a different method of dividing the state into congressional districts.

It is likewise true that annexations to Denver alter the state legislative districts. Article V, Section 45, of the Colorado Constitution provides that the general assembly shall revise and adjust the apportionment for senators and representatives on the basis of a prescribed enumeration of inhabitants according to ratios fixed by law. Article V, Section 47, of the Colorado Constitution provides for the alteration of senatorial and representative districts as public convenience may require, and also provides that no county shall be divided in the formation of a senatorial or representative district. As in the case of congressional apportionment, the general assembly has chosen the county as the basis of legislative districting. C.R.S. '53, 63-1-3, 63-1-6. Article XX, Section 1, in no way abrogates the constitutional power of the general assembly to alter the senatorial or representative districts of the state.

As to the alteration of judicial districts, Article VI, Section 14, provides that the general assembly may increase or diminish the number of judicial districts and the judges therein, and that such districts shall be formed of compact territory and be bounded by county lines. Article XX, Section 1, provides that the City and County of Denver shall constitute one judicial district. The fact that an-

nexations to the City and County of Denver result in changing the boundaries of judicial districts is a consequence of these constitutional provisions along with the general annexation provisions of Article XX, Section 1. There still remains with the general assembly the power to increase or diminish the number of judicial districts in keeping with constitutional standards.

"[7] Plaintiffs finally argue that annexations to Denver violate the Colorado School District Act which provides in pertinent part that "no consolidation of existing school districts, annexation to existing districts . . . shall be made except as permitted under this article." C.R.S. '53, 123-25-39. We point out, however, that by virtue of Article XX, Section 7, the City and County of Denver is constituted as one school district, to be known as District No. 1. This constitutional provision also provides that "Upon the annexation of any contiguous municipality which shall include a school district or districts or any part of a district, said school district or districts or part shall be merged in said 'District No. 1.' . . . ." Although annexations under Article XX, Section 1, result in changing the boundaries of school districts, they do not render the annexation provisions of Article XX, Section 1, void, since the statute must yield to the constitution. It is expressly provided in Article XX, Section 7, that "*Except as inconsistent with this amendment*, the general school laws of the state shall, unless the context evinces a contrary intent, be held to extend and apply to the said 'District No. 1.'" (Emphasis added.) We do not acknowledge that there is any inconsistency between the School District Act and Article XX, but merely point out the underlying fallacy of plaintiffs' argument that Article XX is subordinate to the provisions of the statute.

In summary we hold that the annexations in these cases to the City and County of Denver under Article XX, Section 1, of the Colorado Constitution are not violative of the federal or state constitutions.

The judgments dismissing the complaint are accordingly affirmed.

Appendix B

ARTICLE XX

City and County of Denver and Other Home Rule Cities and Towns

Section 1. Incorporated.—The municipal corporation known as the city of Denver, and all municipal corporations and that part of the quasi-municipal corporation known as the county of Arapahoe, in the state of Colorado, included within the exterior boundaries of the said city of Denver as the same shall be found when this amendment takes effect, are hereby consolidated and are hereby declared to be a single body politic and corporate, by the name of the "City and County of Denver." By that name said corporation shall have perpetual succession, and shall own, possess and hold all property, real and personal, theretofore owned, possessed or held by the said city of Denver and by such included municipal corporations, and also all property, real and personal, theretofore owned, possessed or held by the said county of Arapahoe, and shall assume, manage and dispose of all trusts in any way connected therewith; shall succeed to all the rights and liabilities, and shall acquire all benefits, and shall assume and pay all bonds, obligations and indebtedness of said city of Denver, and of said included municipal corporations and of the county of Arapahoe; by that name may sue and defend, plead and be impleaded, in all courts and places, and in all matters and proceedings; may have and use a common seal and alter the same at pleasure; may purchase, receive, hold and enjoy, or sell and dispose of, real and personal property; may receive bequests, gifts, and donations of all kinds of property, in fee simple, or in trust for public, charitable or other purposes; and do all things

and acts necessary to carry out the purposes of such gifts, bequests and donations, with power to manage, sell, lease or otherwise dispose of the same in accordance with the terms of the gift, bequest or trust; shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct and operate, water works; light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof, and any such systems, plants or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminen domain, and shall have power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided.

The general annexation and consolidation statutes of the state shall apply to the city and county of Denver to the same extent and in the same manner that they would apply to the city of Denver if it were not merged, as in this amendment provided, into the city and county of Denver. Any contiguous town, city or territory hereafter annexed to or consolidated with the city and county of Denver, under any of the laws of this state, in whatsoever county the same may be at the time, shall be detached per se from such other county and become a municipal and

territorial part of the city and county of Denver, together with all property thereunto belonging.

The city and county of Denver shall alone always constitute one judicial district of the state.

Added November 4, 1902.

Section 2. Officers.—The officers of the city and county of Denver shall be such as by appointment or election may be provided for by the charter; and the jurisdiction, term of office, duties and qualifications of all such officers shall be such as in the charter may be provided; but the charter shall designate the officers who shall, respectively, perform the acts and duties required of county officers to be done by the constitution or by the general law, as far as applicable. If any officer of said city and county of Denver shall receive any compensation whatever, he or she shall receive the same as a stated salary, the amount of which shall be fixed by the charter, or, in the case of officers not in the classified civil service, by ordinance within limits fixed by the charter, and paid out of the treasury of the city and county of Denver in equal monthly payments; provided, however, no elected officer shall receive any increase or decrease in compensation under any ordinance passed during the term for which he was elected.

As amended November 7, 1950 (See Laws 1951, p. 232.)

Section 3. Transfer of government.—Immediately upon the canvass of the vote showing the adoption of this amendment, it shall be the duty of the governor of the state to issue his proclamation accordingly, and thereupon the city of Denver, and all municipal corporations and that part of the county of Arapahoe within the boundaries

of said city, shall merge into the city and county of Denver, and the terms of office of all officers of the city of Denver and of all included municipalities and of the county of Arapahoe shall terminate; except, that the then mayor, auditor, engineer, council (which shall perform the duties of a board of county commissioners), police magistrate, chief of police and boards, of the city of Denver shall become, respectively, said officers of the city and county of Denver, and said engineer shall be ex officio surveyor and said chief of police shall be ex officio sheriff of the city and county of Denver; and the then clerk and ex officio recorder, treasurer, assessor and coroner of the county of Arapahoe, and the justices of the peace and constables holding office within the city of Denver, shall become, respectively, said officers of the city and county of Denver, and the district attorney shall also be ex officio attorney of the city and county of Denver. The foregoing officers shall hold the said offices as above specified only until their successors are duly elected and qualified as herein provided for; except that the then district judges, county judge and district attorney shall serve their full terms, respectively, for which elected. The police and firemen of the city of Denver, except the chief of police as such, shall continue severally as the police and firemen of the city and county of Denver until they are severally discharged under such civil service regulations as shall be provided by the charter; and every charter shall provide that the department of fire and police and the department of public utilities and works shall be under such civil service regulations as in said charter shall be provided.

Added November 4, 1902.

Section 4. First charter.—The charter and ordinances

of the city of Denver as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver; but the people of the city and county of Denver are hereby vested with and they shall always have the exclusive power in the making, altering, revising or amending their charter and, within ten days after the proclamation of the governor announcing the adoption of this amendment the council of the city and county of Denver shall, by ordinance, call a special election, to be conducted as provided by law, of the qualified electors in said city and county of Denver, for the election of twenty-one taxpayers who shall have been qualified electors within the limits thereof for at least five years, who shall constitute a charter convention to frame a charter for said city and county in harmony with this amendment. Immediately upon completion, the charter so framed, with a prefatory synopsis, shall be signed by the officers and members of the convention and delivered to the clerk of said city and county who shall publish the same in full, with his official certification, in the official newspaper of said city and county, three times, and a week apart, the first publication being with the call for a special election, at which the qualified electors of said city and county shall by vote express their approval or rejection of the said charter. If the said charter shall be approved by a majority of those voting thereon, then two copies thereof (together with the vote for and against) duly certified by the said clerk, shall, within ten days after such vote is taken, be filed with the secretary of state, and shall thereupon become and be the charter of the city and county of Denver. But if the said charter be rejected, then, within thirty days thereafter, twenty-one members of a new charter conven-

tion shall be elected at a special election to be called as above in said city and county, and they shall proceed as above to frame a charter, which shall in like manner and to the like end be published and submitted to a vote of said voters for their approval or rejection. If again rejected, the procedure herein designated shall be repeated (each special election for members of a new charter convention being within thirty days after each rejection) until a charter is finally approved by a majority of those voting thereon, and certified (together with the vote for and against) to the secretary of state as aforesaid, whereupon it shall become the charter of the said city and county of Denver and shall become the organic law thereof, and supersede any existing charters and amendments thereof. The members of each of said charter conventions shall be elected at large; and they shall complete their labors within sixty days after their respective election.

Every ordinance for a special election of charter convention members shall fix the time and place where the convention shall be held, and shall specify the compensation, if any, to be paid the officers and members thereof, allowing no compensation in case of non-attendance or tardy attendance, and shall fix the time when the vote shall be taken on the proposed charter, to be not less than thirty days nor more than sixty days after its delivery to the clerk. The charter shall make proper provision for continuing, amending or repealing the ordinances of the city and county of Denver.

All expenses of charter conventions shall be paid out of the treasury upon the order of the president and secretary thereof. The expenses of elections for charter conventions and of charter votes shall be paid out of the treasury upon the order of the council.

No franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified taxpaying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise. The council shall have power to fix the rate of taxation on property each year for city and county purposes.

Added November 4, 1902.

Section 5. New charters, amendments or measures. The citizens of the city and county of Denver shall have the exclusive power to amend their charter or to adopt a new charter, or to adopt any measure as herein provided.

It shall be competent for qualified electors in number not less than five per cent. of the next preceding gubernatorial vote in said city and county to petition the council for any measure, or charter amendment, or for a charter convention. The council shall submit the same to a vote of the qualified electors at the next general election not held within thirty days after such petition is filed; whenever such petition is signed by qualified electors in number not less than ten per cent. of the next preceding gubernatorial vote in said city and county, with a request for a special election, the council shall submit it at a special election to be held not less than thirty nor more than sixty days from the date of filing the petition; provided, that any question so submitted at a special election shall not again be submitted at a special election within two years thereafter. In submitting any such charter, charter amendment or measure, any alternative article or proposition may be

presented for the choice of the voters, and may be voted on separately without prejudice to others. Whenever the question of a charter convention is carried by a majority of those voting thereon, a charter convention shall be called through a special election ordinance as provided in section four (4) hereof, and the same shall be constituted and held and the proposed charter submitted to a vote of the qualified electors, approved or rejected, and all expenses paid, as in said section provided.

The clerk of the city and county shall publish, with his official certification, for three times, a week apart, in the official newspapers, the first publication to be with his call for the election, general or special, the full text of any charter, charter amendment, measure, or proposal for a charter convention, or alternative article or proposition, which is to be submitted to the voters. Within ten days following the vote the said clerk shall publish once in said newspaper the full text of any charter, charter amendment, measure, or proposal for a charter convention, or alternative article or proposition, which shall have been approved by majority of those voting thereon, and he shall file with the secretary of state two copies thereof (with the vote for and against) officially certified by him, and the same shall go into effect from the date of such filing. He shall also certify to the secretary of state, with the vote for and against, two copies of every defeated alternative article or proposition, charter, charter amendment, measure or proposal for a charter convention. Each charter shall also provide for a reference upon proper petition therefor, of measures passed by the council to a vote of the qualified electors, and for the initiative by the qualified electors of such ordinances as they may by petition request.

The signatures to petitions in this amendment mentioned need not all be on one paper. Nothing herein or elsewhere shall prevent the council, if it sees fit, from adopting automatic voter registers for use at elections and references.

No charter, charter amendment or measure adopted or defeated under the provisions of this amendment shall be amended, repealed or revived, except by petition and electoral vote. And no such charter, charter amendment or measure shall diminish the tax rate for state purposes fixed by act of the general assembly, or interfere in any wise with the collection of state taxes.

The city council, or board of trustees, or other body in which the legislative powers of any home rule city or town may then be vested, on its own initiative, may submit any measure, charter amendment, or the question whether or not a charter convention shall be called, at any general or special state or municipal election held not less than 30 days after the effective date of the ordinance or resolution submitting such question to the voters.

As amended November 7, 1950. (See Laws 1951, p. 232.)

Section 6. Home rule for cities and towns.—The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

Proposals for charter conventions shall be submitted by the city council or board of trustees, or other body in which the legislative powers of the city or town shall then be vested, at special elections, or at general, state or municipal elections, upon petition filed by qualified electors, all in reasonable conformity with section 3 of this article, and all proceedings thereon or thereafter shall be in reasonable conformity with sections 4 and 5 of this article.

From and after the certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

a. The creation and terms of municipal officers, agencies and employments; the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees;

b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;

c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of the officers thereof;

d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;

e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;

g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the State of Colorado, so far as applicable, shall continue to apply to such cities and towns, except in so far as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the secretary of state, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the secretary of state, which provisions are not in conflict with this article, and all elections and electoral votes heretofore had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date.

Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force.

The provisions of this section 6 shall apply to the city and county of Denver.

This article shall be in all respects self-executing.

As amended November 5, 1912. (See Laws 1943, p. 669.)

Section 7. City and county of Denver single school district—consolidations.—The city and county of Denver shall alone always constitute one school district, to be known as District No. 1, but its conduct, affairs and business shall be in the hands of a board of education consisting of such numbers, elected in such manner as the general school laws of the state shall provide, and until the first election under said laws of a full board of education which shall be had at the first election held after the adoption of this amendment, all the directors of school district No. 1, and the respective presidents of the school boards of school districts Nos. 2, 7, 17 and 21, at the time this amendment takes effect, shall act as such board of education, and all districts or special charters now existing are hereby abolished.

The said board of education shall perform all the acts and duties required to be performed for said district by the general laws of the state. Except as inconsistent with this amendment, the general school laws of the state shall, unless the context evinces a contrary intent, be held to extend and apply to the said "District No. 1."

Upon the annexation of any contiguous municipality which shall include a school district or districts or any part of a district, said school district or districts or part

shall be merged in said "District No. 1," which shall then own all the property thereof, real and personal, located within the boundaries of such annexed municipality, and shall assume and pay all the bonds, obligations and indebtedness of each of the said included school districts, and a proper proportion of those of partially included districts:

Provided, however, that the indebtedness, both principal and interest, which any school district may be under at the time when it becomes a part, by this amendment or by annexation, of said "District No. 1," shall be paid by said school district so owing the same by a special tax to be fixed and certified by the board of education to the council which shall levy the same upon the property within the boundaries of such district, respectively, as the same existed at the time such district becomes a part of said "District No. 1," and in case of partially included districts such tax shall be equitably apportioned upon the several parts thereof.

Added November 4, 1902.

Section 8. Conflicting constitutional provisions declared inapplicable.—Anything in the constitution of this state in conflict or inconsistent with the provisions of this amendment is hereby declared to be inapplicable to the matters and things by this amendment covered and provided for.

Added November 4, 1902.

Appendix C

Annexation of Territory

139-11-1. Eligible territory may be annexed.—Territory in the state of Colorado may be annexed to a city, city and county, or incorporated town, provided the territory is eligible therefor, as set out in section 139-11-2, and provided the procedures set out in sections 139-11-3 and 139-11-4 shall have been complied with.

139-11-2. Eligibility for annexation.—Territory shall be eligible for annexation if such territory:

(1) Is not embraced within any city, city and county, or incorporated town, and

(2) Abuts upon or is contiguous to the city, city and county, or incorporated town to which it is proposed to be annexed in a manner which will afford reasonable ingress and egress thereto, provided that not less than one sixth of the aggregate external boundaries of the territory proposed to be annexed must coincide with existing boundaries of the annexing municipality;

(3) Is otherwise qualified under this section but is noncontiguous solely because a platted street or alley, right of way, public or private, or a lake, reservoir, stream or other waterway lies between the municipality and the territory proposed to be annexed;

(4) Or is situated entirely within the outer boundaries of the annexing municipality, provided, if said territory has been completely surrounded for a period of at least twenty years, it may be annexed by ordinance passed

by the city council or board of trustees of the city, city and town, without complying with any of the other provisions of this article;

(5) Is such that the noncontiguous boundaries thereof coincide with existing block lines, or center lines of established streets, roads, highways, or alleys, or with governmental subdivision lines for purposes of identification whenever this is possible.

In determining territory eligible for annexation and establishing boundaries of any territory to be annexed, no territory owned by the same owner, whether consisting of one tract or parcel of real estate or two or more contiguous tracts or parcels of real estate, shall be divided into separate parts or parcels without the written consent of the owner thereof.

139-11-3. Proceedings initiated — when complete. — Proceedings for annexation of territory eligible as defined in section 139-11-2 shall be initiated by a written petition presented to the legislative body of the city, city and county or incorporated town to which it is proposed to annex such territory, signed by the owners of more than fifty per cent of the area of such territory who shall also comprise a majority of the landowners residing in the territory at the time the petition is filed. When there are no residents of the territory then the signatures of owners of over one-half the area of the territory involved will be sufficient for the purposes of this article. The circulator of each such petition, which may consist of one or more sheets, shall make an affidavit thereto that each signature thereon is the signature of the person whose name it purports to be. The resident address of each signer shall ac-

company the signature, together with the date of signature. Said petition shall also contain a description of the property to be included within the area proposed to be annexed which is owned by each person signing said petition. All persons signing said petition shall indicate on the petition whether they are qualified electors and landowners as prescribed in this section, or whether they are only landowners. No such petition shall be valid for the purposes of this article if any signature thereon is dated more than one hundred and eighty days prior to the date of filing said petition with the legislative body of the municipality. All petitions which substantially comply with the above requirements shall be deemed sufficient. No person signing said petition shall be permitted to withdraw his signature from said petition after the petition has been filed with the legislative body. The petition shall be accompanied by four copies of a map, or plat, of such territory showing, with reasonable certainty, the territory to be annexed, the boundaries thereof, and its relationship to the established corporate limits of the municipality to which said territory is proposed to be annexed, and upon material and of a suitable size for recording or filing in the various offices required under this section.

If such legislative body shall find that the petition and the documents attached thereto meet the requirements of this section, the annexation of such territory to such city, city and county, or incorporated town shall be accomplished, when no qualified counterpetition has been filed as provided in section 139-11-4, by the following procedure: The legislative body shall by resolution accept or reject the petition and if it accepts same, not sooner than thirty days after the first publication of notice of petition as provided in section 139-11-4, it shall approve the annexation by

ordinance and shall file one copy of the map or plat in the office of the clerk and recorder of the county in which such territory shall have been located at the time of filing of the petition, and another copy of such map or plat in the office of the clerk of the city, city and county, or incorporated town to which it is proposed that such territory shall be annexed together with a certified or photostatic copy of the petition, and a copy of said map or plat, together with such approving ordinance with the secretary of state of Colorado. The annexation of such territory to such city, city and county, or incorporated town shall be complete on the effective date of the annexation ordinance for all purposes except that of general taxation in which respect it shall not become effective until on and after the first day of January, next ensuing.

Appendix D

In the Matter of LEGISLATIVE REAPPORTIONMENT

HAROLD STEIN, etc., Petitioner,

v.

The GENERAL ASSEMBLY of the STATE of Colorado et al., Respondents.

No. 20240

Supreme Court of Colorado.

En Banc.

July 6, 1962.

Reconsideration Denied July 12, 1962.

DAY, Chief Justice.

This matter is before the court on original proceedings seeking the issuance of a prerogative or remedial writ.

[1] It is apparent from the prayer of the petition and from the answers to the show cause orders issued by the court pursuant to said prayer that the relief asked for is not within the constitutional powers of this court to grant. It has long been the established rule, however, confirmed by the Colorado Rules of Civil Procedure, that if the allegations of the petition are such as to invoke both the jurisdiction of the court and to entitle the petitioner, on the face thereof, to some relief, the mere fact that one misconceives his remedy will not deprive the court of jurisdiction to act.

[2] Before proceeding, however, to a discussion of: first, the jurisdiction of the court and second, whether it is incumbent upon the court to act at this time, we wish to state at the outset that under the separation of powers doctrine we cannot and will not command the Governor to do anything, the doing of which lies within his sound discretion, and we deem his authority to call the Legislature into special session to be such prerogative. Veto Power, etc. 9 Colo. 642; 21 P. 477.

[3] It appears from the Governor's answer that conceiving it his duty to call the matter of apportionment to the attention of the 43rd General Assembly, he twice included the matter among the subjects presented to the Legislature for consideration. He states, and we agree, that he was powerless to do more.

[4-7] As to the other officers of the state, to-wit: the Secretary of State and the Treasurer, we concede, as averred in their answer, that this court cannot and should not enjoin upon them duties that they do not have under the constitution or prohibit them from exercising duties imposed upon them by the constitution. The Secretary of State has no discretion but to carry out the election laws as prescribed by statute, and the Treasurer, on vouchers properly presented to him, where appropriations have been made therefor, must make disbursements as commanded by said vouchers. Accordingly, the rule as it affects the Governor, Secretary of State and Treasurer is discharged.

1. JURISDICTION OF THE COURT

[8] We proceed now to the question of the jurisdiction of this court over the subject matter of the petition. Petitioner has alleged facts and has referred to the consti-

tutional provisions and statutes which in their materiality to the issues framed are either admitted or are so well known and generally accepted that the court will take judicial notice thereof. In summary, pertinent allegations are that the General Assembly has never provided for a state census; an enumeration made by the authority of the United States was last made in the year 1960; the current (43rd) General Assembly sat in the years 1961 and 1962, and it is not scheduled regularly or automatically to sit again; the matter of apportionment by the senators and representatives was brought before the General Assembly in both years, but no reapportionment act was enacted; the statutes of Colorado relating to apportionment are C.R.S. '53, 63-1-1 to 63-1-8, inclusive. There are general allegations in the petition concerning approximate population figures, later embellished in a memorandum brief under the statement of facts by actual figures taken from the official 1960 Federal census. From all that appears, both in the petition and the memorandum brief of petitioners, the parties are entitled to call these matters to the attention of the court. In at least a half dozen cases, commencing with Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691; 7 L.Ed. 2d 663, the Supreme Court of the United States has made this plain. As was said recently in Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 161 A.2d 705:

> "The judicial branch of the government has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights granted thereby to the people. In this sphere of activity the courts recognize that they have no power to overturn a law adopted by the Legislature within its constitutional limitations, even though the law may be unwise, impolitic or unjust. The remedy in such cases lies with the people. But when legislative action exceeds

the boundaries of the authority delegated by the Constitution, and transgresses a sacred right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts. It cannot be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it the solemn duty to interpret the laws in the last resort. However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it. State v. Wrightson, supra, 56 N.J.L. [126,] at page 209, 28 A. [56,] at page 65 [22 L.R.A. 548]. The authority and the duty to act when our jurisdiction is invoked in cases like the present, in the words of Chief Justice Beasley in State v. Rogers, 56 N.J.L. 480, 615, 28 A. 726, 757, 29 A. 173 (Sup. Ct. 1894), is 'so entirely established as not to be debatable.' And as the present Chief Justice said in Village of Ridgefield Park v. Bergen Co. Bd. of Taxation, 31 N.J. 420, 426, 157 A.2d 829, 832 (1960), when it is regularly invoked we cannot 'properly look the other way.'"

The majority opinion then went on to say:

"From the foregoing it is manifest that the triunity of our government is not invaded by acceptance of this litigation for decision. If by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, the doors of the courts must be open to him. The lawmaking body cannot by inaction alter the constitutional system under which it has its own existence."

Since it is abundantly clear that this court has juris-

diction, we come to the question: was it mandatory under the plain wording of the Constitution for the 43rd General Assembly to enact a reapportionment bill in any of the three sessions held by it?

The answer to this question lies in a reasonable interpretation of Article V, section 45 of the constitution which reads:

> "The general assembly shall provide by law for an enumeration of the inhabitants of the state, in the year of our Lord 1885, and every tenth year thereafter; and at the *session* next following such enumeration, and also at the *session* next following an enumeration made by the authority of the United States, shall revise and adjust the apportionment for senators and representatives, on the basis of such enumeration according to ratios to be fixed by law." (Italics ours)

[9] It is the contention of the petitioner herein that the 43rd General Assembly defaulted in the duty imposed upon it by the above section in 1961 and again in 1962. If such default did occur, then this court cannot stand by and permit by inaction defiance of the constitution—any more than we can sustain affirmative action of a legislature in plain violation of the constitution. However, there is restraint imposed upon the judiciary in all constitutional questions, i. e., that the violation must appear beyond all reasonable doubt.

[10] There is also a presumption in which the court must indulge, namely, that the Legislature has acted according to its oath to uphold the constitution unless the contrary appears beyond doubt. "A judiciary, conscious of

the sacrosanct quality of its oath of office to uphold the Constitution, cannot accept an *in terrorem* argument based upon the notion that members of a coequal part of the government will not be just as respectful and regardful of the obligations imposed by their similar oath. Any less faith on our part would be an unbecoming and unwarranted reflection on the Legislature." Asbury Park Press, Inc. v. Woolley, supra.

[11, 12] A step by step analysis of the legislative history of 1961, 1962 as revealed in the answers filed discloses some facts which cast doubt upon whether the constitution imposed any duty on the current 43rd General Assembly now in recess sine die. From the answer of the Governor we are informed that he was not able to certify to the Legislature the enumeration of the various counties and legislative and senatorial districts until March 21, 1961, at which time he sent a message to the General Assembly then in session. We note from other available data that as of that date the 43rd General Assembly had been in session almost three full calendar months and was preparing to adjourn, which it did on April 4, 1961. It seems clear that the 1961 session then cannot be construed to be the "session *next* following the enumeration", because that one was, for all practical purposes past. Actually the *next* session was in June, 1961—an extraordinary one—lasting two days and called especially to correct some school finance legislation. One could not contend that it was *mandatory* under the constitution to enact reapportionment legislation at that "next" session because of limitations in the call of the Governor which prevented any such consideration by the Assembly.

[13] We then look at the 1962 session. Such even-

numbered annual sessions were not provided for at the time section 45 was embodied in the original constitution. Though section 45 remains unchanged, a 1950 amendment to the constitution provided for annual sessions in place of the bi-annual session which had been held for 74 prior years. But the session in the even-numbered years is also a "limited one" in which only fiscal matters and bills "pertaining to subjects designated by the Governor in writing during the first ten days of the session" can be considered. So there is still only one session every two years in the odd-numbered years in which the Legislature has unlimited control over the bills to be introduced. True, the Governor designated reapportionment legislation as one of the subjects which the Assembly *might* consider in this session. But it is not mandatory by any law or constitutional provision that he do so and had he failed or refused to, the Legislature could not have even discussed the subject. A mandatory duty is one *directly imposed* without the discretion or intervention of any third party either required or permitted. Thus to effect enactment of a reapportionment bill in 1962 *required* the intervention of the Governor to make its performance possible. Can we, therefore, say that what was before the Assembly only by virtue of the Governor's call is a subject matter to be characterized as *mandatory* upon the 43rd General Assembly, or merely permissive? The Legislature tried to enact a bill. More than a half a dozen different versions were introduced, and many legislators labored long and hard but fruitlessly to enact a suitable statute. The question is, was the constitution defied when they failed? Was this an invidious and deliberate discriminatory action? We think not. With the presumption in favor of the Legislature performing its duty and discharging its oath, the constitutional mandate

to reapportion did not devolve on the 43rd General Assembly but rather such legislation is not mandatory until the 44th General Assembly convenes. We hold that we can and must await the action of the 44th General Assembly.

Such an interpretation does not do violence to the constitution, is a reasonable one, and is consistent with the history of Colorado reapportionment enactments in the past. Such an interpretation still gives to the people reapportionment in the 10th year following the last enactment in 1953. Historically, in 1913, 1933 and 1953 reapportionment was considered and enacted by the session of the *General Assembly convened* next following the enumeration. The many years of unchallenged practical application given to the words used in the constitution, if interpolated, give it an unambiguous meaning so as to make the section read, "* * * and at the session [of the General Assembly] next following such enumeration and also at the session next following an enumeration made by the authority of the United States shall revise and adjust the apportionment * * *." Why should the judiciary command reapportionment as early as the eighth or ninth year since the 1953 apportionment? If it is our duty to do so, then we must not shirk it, but if it is not required for us to act forthwith, we should await the proper time. If we must act in the future we will have to arrive at some workable solution. At this moment it does not appear that the suggested election at large would be feasible, though we may come to it. Obviously it would destroy all districts, even those entitled to the number of representatives they now have. We believe that in sections 5 and 47 of the constitution (Article V) districting by the Legislature is contemplated. Originally sections 48 and 49, Article V, provided for districting. The repeal of those sections in 1950 was

in our opinion, intended only to delete from the constitution those sections which became self-eliminated once the Legislature had divided the state as therein commanded, as was done for the first time in 1887. Problems posed by a mandate from us ordering a legislative election of 100 members-at-large staggers the imagination, and we trust we will be able to determine a better solution if we come to the point of directive decision. We can see that aside from the fact that there is no election law to guide the conventions of political parties in the process of nominating such members-at-large, the ballot would be unmanageable. Voting machines could not be used. Paper ballots in every county would have to contain at least 130 candidates for representatives and at least 34 for the office of senator upon which the people could vote for any 65 for representatives. They would have the choice of only 17 senators because half of the senate is composed of holdover senators elected for four years. In addition there would be all the candidates for county and state offices and several constitutional amendments. A lengthy paper ballot so composed would be of such proportions as to be almost impossible to read or vote upon, and even more staggering to tally and certify. And the resultant composition of the Legislature would compound present alleged inequities.

As for the future—if we were now to hold the Legislature to be required to reapportion in the second or even-year of the decade, we would have a precedent-making decision encroaching upon the discretion of all future governors, compelling them to include reapportionment in every call in the even numbered years. That would be an invasion of the executive branch for 1972 or 1982, etc. when all agree the judiciary has no such powers.

[14] Another compelling reason to withhold action

until after the 44th General Assembly is organized and convened is present. By reason of the showing made by intervenors in these proceedings we are informed that the people have taken this problem unto themselves for solution by constitutional amendment. And, since in Colorado, as distinguished from Baker v. Carr, supra, all power has been reserved by the people through the initiative and referendum, there is no need for the judiciary to take action until it is determined that both the people and the Legislature have failed to act. Retaining jurisdiction until other processes of governmental structure have had an opportunity to function is not without precedent. In McGraw v. Donovan, 168 F.Supp. 184 (D.C.Minn.1958) a three-judge Federal court retained jurisdiction of a similar justiciable issue and declared:

> "It seems to us that if there is to be a judicial disruption of the present legislative apportionment or of the method or machinery for electing members of the State Legislature, it should not take place unless and until it can be shown that the Legislature meeting in January 1959 has advisedly and deliberately failed and refused to perform its constitutional duty to redistrict the State."

See also Asbury Park Press, Inc. v. Woolley, supra, wherein the New Jersey court retained jurisdiction through adjournment of the next legislative session.

We believe there should be no judicial intrusion into the legislative and executive affairs of the state, and we should be ever mindful of the necessity of preserving the integrity and independence of the coordinate branches of government. We should, therefore, exercise an appropriate

degree of restraint to see if they will carry out their duties. Only if both they and the people fail to act will it become a judicial function to step into the void.

It has been called to our attention that in Tennessee on June 22, 1962 (U.S.D.C. Nashville Div. 266 F.Supp. 341) a three-judge federal court acting pursuant to the mandate of Baker v. Carr, supra (the landmark case from which flows all current reapportionment litigation) decided to retain jurisdiction to give the Tennessee legislature "an opportunity at its 1963 session to enact a fair and valid reapportionment". As authority for so doing the court cited similar procedures in McGraw v. Donovan, D.C.Minn. (1958), supra, Toombs v. Fortson, N.D.Ga., 205 F.Supp. 248, (involving the legislature of Georgia); and the recent Alabama case of Sims v. Frink, D.C., 205 F.Supp. 245. Then the court said:

> "We have confidence that a legislature so elected, having before it the views of the Court * * * as the recent legislature did not, will adopt a plan of reapportionment which will comply with the commands of the Federal Constitution."

So too, then, do we express confidence in either the people adopting a reapportionment amendment at the polls in November, 1962, or in the Legislature appropriately amending the present statutes at the 1963 session. As was said by Mr. Justice Moore in Four-County Met. Capital Imp. Dist. v. Board of County Com'rs, 150 Colo.—, 369 P.2d 67, referring to the "Home Rule Amendment" to the constitution:

> "* * * If in fact the home rule provision of the constitution is obsolete the remedy is to bring about

its repeal or amendment. It would indeed be a 'black day' for Denver as well as for the entire state of Colorado if this court were to presume to amend or repeal this provision of the constitution by judicial fiat. * * * "

We add that if the original concept that the Legislature should have both the right and the duty to reapportion itself seems now unfeasible or if it is intended that the Legislature must consider reapportionment at the "very first opportunity" following a Federal census, then the remedy is a constitutional amendment. Many thousands of the electorate have felt some change is needed and have taken the appropriate steps to submit it to a vote. Whether such action will solve the problem must await the passage of time.

And time is what we should await now. Should the constitution be amended then there would be no duty on the 44th General Assembly to enact a reapportionment bill, except as directed by the new amendment. Should the people fail to adopt one of the amendments to appear on the ballot, then we hold the duty on the 44th General Assembly to be mandatory.

Accordingly, an order will be entered reserving final judgment herein on all issues until either a constitutional amendment has been passed by the voters in November, 1962, or until the 44th General Assembly in its 1963 session has had an opportunity to act in the matter, but in the case of the latter such action to be not later than June 1, 1963. After that date or after the Legislature has adjourned, if there is no new constitutional amendment or no proper legislative reapportionment enacted, the case may

be reopened upon application of any party or upon the court's own motion. Notwithstanding such time limits, full jurisdiction is retained.

SUTTON, McWILLIAMS and PRINGLE, JJ., concur.

MOORE and FRANTZ, JJ., dissent.

HALL, J., specially dissents.

SUTTON, Justice (also specially concurring).

Though I concur in the majority opinion I desire to comment upon another matter not fully treated therein and not discussed by either Mr. Justice MOORE or Mr. Justice HALL in their separate dissents.

I am persuaded that we cannot act at this time because the people of Colorado have wisely and validly reserved to themselves the right and power to correct such matters as the one in dispute by use of the initiative and referendum (Art. V, Sec. 1, The Colorado Constitution). Such a reserved power in the voters in Colorado distinguishes the present case from Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, 1962. In Tennessee, where Baker arose, *the voters had no way to correct the political inequality which has long existed.* They were, in effect, remedyless unless the judiciary assumed the responsibility of fashioning appropriate relief to insure constitutional voting rights. In Baker immediate judicial action was proper but even there the remedy could not be made available forthwith.

Here if the petitioner is not afforded relief either by action of the electorate in the November 1962 election or by the Forty-fourth General Assembly, then it will be the

duty of this court under the Baker decision to take appropriate action.

I believe that matters such as the proportionate equality of voting stand on a somewhat different procedural plane for action than some other constitutional rights which require very prompt if not instantaneous adjudication by the courts to render effective relief. For example, if petitioner had been denied his right to vote at all, we would have a different problem. Or, if he were charged with a crime or were imprisoned without charge, then we would forthwith rule on his right to a writ of habeas corpus or to other protections to which he is entitled.

My belief that proportionate equality of voting is different is twofold: First, by its very nature it is a political problem. Constantly shifting population in affected areas make exact mathematical representation, even if required, impossible to attain or to maintain, even if by some legerdemain population in such areas could be kept static. Second, due to shifting population and the imbalance that results, it is obvious that for at least nine year periods (assuming representation were readjusted each tenth year) voters in the growing areas could be validly (but temporarily) denied theoretical equality. Even Mr. Justice MOORE seems to accept such a constitutional lag.

Therefore this petitioner because of the political nature of the relief sought must await the turning of the wheel until it touches his grounded rights.

Thus my position over and above that of the majority opinion is that relief under the circumstances in Colorado must await first of all, the required constitutional span of time, then legislative action within the required period,

and, if the latter fails then either timely action by the people by initiative and referendum (as is being sought here) or judicial action. The judiciary to intervene, however, only if the legislature or voters fail to act appropriately within a reasonable time.

Mr. Justice PRINGLE states that he concurs in these views as well as with the majority opinion.

MOORE, Justice (dissenting).

This is an original proceeding commenced by the petition of Harold Stein, a citizen, taxpayer, and resident of the City and County of Denver, presenting to the court questions concerning the validity of the statutes of Colorado relating to legislative districting, and claiming the existing legislative districts to be invalid as a violation of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, and as being in violation of the Colorado Constitution, Article V, Section 45.

Article V, Section 45, of the Colorado Constitution provides:

> "The general assembly shall provide by law for an enumeration of the inhabitants of the state, in the year of our Lord 1885, and every tenth year thereafter; and at the session next following such enumeration, and also at the session next following an enumeration made by authority of the United States, shall revise and adjust the apportionment for senators and representatives, on the basis of such enumeration according to ratios to be fixed by law."

Chapter 63, Article I, Section 2, C.R.S. 1953, fixes and

establishes ratios for apportionment of senators and representatives in the general assembly as follows:

"(1) The ratio for the apportionment of senators shall be:

"(a) One senator for each senatorial district for the first nineteen thousand of population therein;

"(b) One additional senator for each senatorial district for each additional fifty thousand of population therein or fraction over forty-eight thousand.

"(2) The ratio for the apportionment of representatives shall be:

"(a) One representative for each representative district for the first eight thousand of population therein;

"(b) One additional representative for each additional twenty-five thousand five hundred of population therein, or fraction over twenty-two thousand four hundred."

Senatorial districts are established by Section 63-1-3, C.R.S. '53. Districts for the election of members of the House of Representatives are established by Section 63-1-6, C.R.S. '53.

Memoranda have been furnished the court by the petitioner, as well as by various of the respondents, and by the Attorney General representing the respondents generally, and the court has heard extensive oral argument. It appears from these presentations, without dispute, that the General Assembly has held sessions as prescribed by the constitution in 1961 and 1962, following the enumeration of population or census made by authority of the

United States in 1960. The last of those sessions has been recessed and adjourned. The general assembly did not, as required by Article V, Section 45, revise and adjust the apportionment for senators and representatives on the basis of the 1960 census according to ratios to be fixed by law.

Applying the ratios prescribed by C.R.S. '53, 63-1-2, and utilizing the census figures, of which this court may take judicial notice and which are before the court in memoranda, it is clear that at least one county with a population of 7,867 has fewer than the minimum 8,000 required for the election of a representative. At least one senatorial district, the sixth, with 18,414 people, has fewer than the 19,000 population required for such a district. It is clear, also, that other counties, including the City and County of Denver, the counties of Adams, Jefferson, and Arapahoe, and other more populous counties, have substantially less representation in each of the houses of the general assembly than they are entitled to under the provisions of Chapter 63, C.R.S. '53.

Colorado's population in 1960 was 1,753,948, an increase of 32.4% over that in 1950. Urban population has increased 55.5%, and rural population declined by 6.6% in that period.

Article V, Section 46, of the Colorado Constitution provides:

> "The senate shall consist of not more than thirty-five and the house of not more than sixty-five members."

Proportioning such membership to the total popula-

tion, we find that each member of the Senate should represent 50,112 citizens, and each member of the House 26,983. In the least populous representative district, 7,867 persons are represented per member. In the City and County of Denver, 29,000 are needed to accomplish the same result. In Jefferson county, approximately 63,000 votes are needed, and in Adams, Jefferson and Arapahoe counties on an average 60,250 are needed for this purpose. Like results apply to many others of the populous counties and similar situations exist in both the house and senate. A voter in the least populous county is, therefore, eight times as significant as one in the most populous counties.

Petitioner contends that such result is unconstitutional as a violation of the Fourteenth Amendment in that it is a "debasement of his vote", a denial of equal protection of the law, and that the statute of Colorado under which this gross discrimination exists is violative of the Colorado Constitution, Article V, Section 45.

There is no controversy as to the factual existence of the representative situation described. The census, of which we take judicial notice, sustains these facts, and the responses filed raise no issue in connection therewith.

In Armstrong v. Mitten et al., 95 Colo. 425, 37 P.2d 757, Chapter 156, Session Laws of 1933, was held void because it violated Article V, Section 45, of the Colorado constitution in many of the ways C.R.S. '53, 63-1-1 et seq. is said to offend. It was said in that case that the Act there held to be void "attempts to confer upon some districts a representation that is greater, and upon others a representation that is less, than they are entitled to under the Constitution," and that the requirements of Article V, Section 45, were mandatory, saying: "The people, by sec-

tion 45, supra, command the General Assembly to revise and adjust the apportionment at the session next following the census. The command is clear and explicit, and the people, in inserting it in the Constitution, intended that it should be obeyed."

Petitioner relies upon Baker v. Carr, decided by the Supreme Court of the United States, No. 6, October term, 1961, on March 26, 1962. In that case it is expressly held, with reference to a citizen's suit for reapportionment, "(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes. Beyond noting that we have no cause at this stage to doubt that *the District Court will be able to fashion relief if violations of constitutional rights are found*, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial." (Emphasis supplied)

Respondents contend that our government is one of divided powers, namely, the Legislative, Executive, and Judicial. They argue that even though the legislative branch has failed in the performance of a duty mandatory under the constitution, the judiciary is powerless to remedy the situation, since it can neither compel executive action to call the legislature into session, nor compel the enactment of legislation once that session is convened.

Article VI, Section 3, of the Colorado Constitution provides that this court, "shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, in-

junction, and other original and remedial writs, with authority to hear and determine the same; and each judge of the supreme court shall have like power and authority as to writs of habeas corpus. * * * " It is fundamental that the duty of this court is to uphold the constitutions of both Colorado and the United States. It is equally fundamental that a statute shown to be in violation of either constitution, such statute is void, and this court has the duty to so declare.

For the reasons stated above, it is clear that C.R.S. '53, 63-1-2, 3 and 6, are void and of no effect as in direct violation of Article V, Section 45, of the Constitution of the State of Colorado, and of the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States, and we should declare them void. Armstrong v. Mitten, supra.

Article V, Section 47, of the Colorado Constitution in pertinent part provides:

> "Senatorial and representative districts *may* be altered from time to time, as public convenience may require. * * * " (Emphasis supplied)

Nothing in the Constitution of Colorado requires any specified number of representative districts for either house of the general assembly.

Rule 54(c) of our Rules of Civil Procedure states that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." We have held that under this rule it is the duty of the court to grant all equitable relief to which a party is entitled,

even though not specifically demanded in the prayer. Spears Free Clinic & Hospital v. State Board of Health, 122 Colo. 147, 220 P.2d 872. Such clearly is the authority under the original jurisdiction vested in this court by the Constitution of Colorado, and such is the anticipation of the Supreme Court of the United States as stated in Baker v. Carr, supra.

This court recognizes the fundamental concept of our governmental structure embodied in the separation of powers of government into three departments. This court has in the past, and in this controversy should give full effect to the limitations placed upon the power of the judiciary by Article III of the Constitution of Colorado. We cannot, constitutionally, do for the legislature those things which the constitution specifically provides shall be done by that branch of the government. It is, however, the exclusive function of the judiciary to determine whether enactments of the legislature conform to the limitations placed upon the power of that branch of government by the constitution. *It is also the exclusive function of the judiciary to declare the legal result which comes into existence when the legislative branch of the government fails to do that which the constitution very plainly commands it shall do!*

It is admitted by all participants to this controversy that the 43rd general assembly has failed to obey the mandate of the constitution which forcefully commands that, "the general assembly * * * *at the session next following* an enumeration made by the authority of the United States, *shall* revise and adjust the apportionment for senators and representatives on the basis of such enumeration according to ratios to be fixed by law." (Emphasis supplied)

The people trusted the legislative arm of government to obey this mandate; but admittedly it has failed to perform its duty pursuant to that command. The remedy of the people who seek redress for such breach of trust is to replace those who neglect or refuse to perform their constitutional duty and to supplant them with persons who will be governed thereby.

A plausible argument is advanced in support of the power of this court to do for the people that which the legislature has failed to do, in defiance of the express command of the constitution. Were we to explore this suggestion we would necessarily proceed with due restraint, careful not to subject the judiciary to the charge of usurping powers entrusted by the constitution to other departments of government.

It is argued contra, that for this court to undertake to re-district the state and reapportion seats in the general assembly, in the absence of legislative action, would be the performance of a legislative function. It is contended by petitioner that the application of a mathematical ratio, or the solution of an equation, is not a discretionary but a ministerial function of the kind often performed by the courts and which might lawfully be performed in this case.

It is not necessary, however, for the court to embark upon such adventure, for the reason that the net result of the failure of the legislature to function gives rise as a matter of law to a situation concerning which there can be no doubt. Recognition of that situation and a clear statement thereof affords full protection to petitioner, removes all doubt as to whether he will be denied equal protection of the law in the forthcoming election, and upholds the

pertinent provisions of the Colorado Constitution. It involves no question usurpation by the court of power properly belonging to other departments of government.

We cannot properly command the governor to call a special session of the general assembly; we cannot properly require any member of the legislature to vote for or against a particular piece of legislation. The legislator is not responsible to this court for his conduct. He is responsible to his constituents alone. However the legal consequences which follow from its acts, or its failure to act, are matters which the judiciary alone can pass upon.

It is quite certain that no act of the legislature, and no failure on its part to do that which the constitution commands that it "shall" do, can produce a result prohibited by the Constitution of the United States. By action or inaction no citizen can be deprived of the equal protection of the law. The judiciary has inherent powers to "fashion relief" necessary to prevent violations of constitutional rights.

The question, therefore, to which we should limit this inquiry, is:

What is the legal consequence of the legislature to obey the mandate of the constitution with reference to reapportionment?

In the case before us the petitioner is entitled to equal protection of the law—NOW! The protection afforded the individual by the United States Constitution cannot be temporarily suspended by state action or inaction! That which deprives a citizen of this "equal protection" must be

swept aside and held for naught, even though it be an act of the general assembly or a provision of the state constitution!

Inasmuch as C.R.S. '53, 63-1-2, 3 and 6, are void as above stated, they cannot be given force or effect. Accordingly, by reason of the failure of the general assembly to obey the mandatory requirements of Article V, Section 45, of the constitution, there exists no senatorial or representative districts legally in force in this state.

It is necessary, however, that there exist a legislative body for this state. The constitution in Article V, Section 46, supra, provides that the general assembly consist of a senate of not more than thirty-five and a house of not more than sixty-five members. Under valid provisions of existing law the number of legislators has been fixed at this maximum. No minimum number of districts is provided, and districts may be altered under article V, Section 47, "as public convenience may require."

It is our duty in such circumstances to give effect to the constitution as it exists in so far as it may be enforced. Since the statutes relating to districting and ratios are void, they cannot be utilized. Therefore, the general assembly consisting of a Senate of thirty-five members and a House of Representatives of sixty-five members should be elected from the state at large and by the voters of the state at large.

The Secretary of State of the State of Colorado should be prohibited from permitting the conduct of elections in accordance with the ratios or districting provided in the void chapter 63, Article I, Sections 2, 3 and 6, and should

be required to conduct the forthcoming general election in so far as concerns election of members of the general assembly both Senate and House of Representatives, in such manner that said election is of those persons at large, thirty-five members of the Senate and sixty-five members of the House of Representatives, by the eligible electors of this state, without regard to the representative or senatorial districts or apportionment heretofore recognized.

An opinion of this court should be and constitute an affirmative order to the Secretary of State to the effect set forth herein. No force or effect should be given in any election to the said senatorial or representative districts or existing apportionment, nor should any election be held for the general assembly, including Senate and House of Representatives, of the State of Colorado, save an election at large, *until such time as there shall have been established districts and an apportionment in accordance with the provisions and requirements of Article V, Section 45, of the Constitution of the State of Colorado, and the Fourteenth Amendment to the Constitution of the United States.*

The failure of this court to act affirmatively at this time in a way to grant voting equality is, in effect, an unnecessary delay in the performance of a judicial act which would immediately protect basic rights. The determination of judicial questions and the ultimate protection of constitutional rights rest exclusively with the judicial department of government. Every member of the general assembly admits that the duty imposed upon them by the mandate of the people in the constitution has not been performed. It is not disputed that the only act of the legislature under which its members are selected is unconstitutional and void. It is admitted that unless this

court pronounces the legal result which follows legislative failure, the constitutional rights of tens of thousands of citizens will be denied. The rights involved are the most cherished rights of equality at the ballot box in free elections!

If it be true that an election of legislators at large would cause difficulties or present problems too difficult for some areas to solve, those difficulties and problems would be apparent to those who themselves are directly responsible for their creation. There is ample time before the November election for the general assembly to perform its constitutional duty, and thus remove any and all of the envisioned difficulties, most of which are imaginary and speculative and at best are inadequate excuses for failure to protect constitutional rights. The mandate of the constitution cannot be temporarily suspended by resort to lame excuses for failure to discharge mandatory duties.

There is nothing in the record to indicate that the governor has in any manner failed to do all within his power to uphold the provisions of the state and federal constitutions. Many able members of the legislature strove mightily to discharge their constitutional duty. There is no reason to believe that the chief executive would fail to afford an opportunity to the legislature to remove any complications which might result from an election-at-large and to make provision for the political parties to make selection of candidates if existing laws are, in fact, inadequate for that purpose.

There remains for consideration one further "excuse" for failure of this court to resolve the question by affirmative action. Article V, Section 45, provides that "*at the*

session next following an enumeration made by the authority of the United States" the general assembly shall revise and adjust the apportionment for senators and representatives, on the basis of such enumeration, according to ratios to be fixed by law.

It is contended that the "session next following" the enumeration does not take place until 1963. This does not follow from the wording itself. The census was taken in 1960. There was a session of the legislature in 1961. There was another in 1962. Nothing was done by the legislature in either session. The Governor recognized that it was mandatory that something be done *in those sessions*, and so did the legislature.

There has been a Response to Rule to Show Cause filed by the Attorney General for all of the Respondents. The Response of the Governor states as follows, on page 2:

> "(3) The Governor performed his duty as chief executive officer of the State of Colorado when he reported to the first regular session of the Forty-third General Assembly *on March* 21, 1961, and requested that the legislature reapportion itself in compliance with Article V, Section 45, of the State Constitution.
>
> "(4) The Governor performed his duty again in 1962 when he reported on January 3, 1962, that the official census had been obtained and that the legislature should adopt a new apportionment law."

Thus, the Assembly was informed both in 1961 and in 1962 that it must reapportion on the basis of the 1960 census, and it was provided with that census.

The Assembly itself recognizes the requirement that it reapportion and its duty to do so in the 1961-2 sessions. Thus, in the Response of General Assembly, on page 6 of the Attorney General's filing it is said:

> "(10) The Colorado Constitution in Article V, Section 45, requires the General Assembly to revise the apportionment for senators and representatives following the enumeration of inhabitants by the Bureau of the Census of the United States, and *this duty is and has been recognized by the General Assembly* because bills were introduced in both sessions of the Forty-third General Assembly to accomplish this objective.
>
> "(11) Although an apportionment act was not adopted by the Forty-third general assembly because of a disagreement among its constituent members, they have not wilfully ignored this constitutional mandate."

Again, in the Response of all Respondents, on page 7 of the Attorney General's filing, it is said:

> "(5) Two bills and two amendments to the Constitution of Colorado were introduced in the First Regular Session of the Forty-third General Assembly, and eight bills and six amendments to the constitution were introduced in the Second Regular Session of the Forty-third General Assembly dealing with apportionment, but none of them passed, showing that the General Assembly has attempted to obey its constitutional mandate to apportion the legislature *based on the federal census in* 1960."

The applicable census volume is that volume which is

captioned by SUGGESTED CITATION on page ii thereof: "U. S. BUREAU OF THE CENSUS. U. S. CENSUS OF POPULATION: 1960. NUMBER OF INHABITANTS, COLORADO. FINAL REPORT PC(1)—7A." It is claimed that this was not available in 1961. On page iii is the Preface and the Acknowledgments. THESE ARE DATED: "*February* 1961."

Not only was the document available in 1961, but it was sent by the Governor to the General Assembly then in session in that year. The session next following the 1960 census. The Attorney General has filed a Memorandum in Support of Response here. On page 4, he states, for the Governor, as follows:

> "c. The Governor has diligently upheld his oath of office by doing everything within his executive powers to cause apportionment and aid the General Assembly of the State of Colorado to enact laws apportioning the state legislature, including, but not limited to the following, to-wit:
>
> "(1) On March 21, 1961, the Governor sent to the 43rd General Assembly of the State of Colorado, 1st Regular Session (1961) the following official message, which appears in the Senate Journal of said session for Thursday, March 23, 1961, at page 611, and in the House Journal of said session, for March 22, 1961, beginning at page 764, to-wit:
>
> "'MESSAGE FROM THE GOVERNOR.
>
> "'March 21, 1961.
>
> "'Forty-third Colorado General Assembly.
>
> "'I have just received from the Bureau of the Census, U. S. Department of Commerce, and I have

the privilege of *transmitting to you*, the official 1960 Census of the State of Colorado.

"This report is forwarded to you for your appropriate action regarding apportionment of legislative representation in accordance with the directives of the Constitution of Colorado, Article V, Sections 44 through 47.

"Steve McNichols."

"(2) On January 3, 1962, the Governor sent to the 43rd General Assembly of the State of Colorado, 2nd Regular Session (1962) the following official message, being the Governor's first message to said session, wherein there were designated subjects to be considered by said general assembly, which message appears in the Senate Journal of said session for Wednesday, January 3, 1962, beginning at page 5, and in the House Journal of said session for Wednesday, January 3, 1962, beginning at page 7, to-wit:

"MESSAGE FROM THE GOVERNOR

"January 3, 1962.

"To the Forty-third General Assembly,
"State of Colorado
"Ladies and Gentlemen:

"Pursuant to the authorization contained in Section 7, Article V of the Constitution of the State of Colorado, wherein it is provided that the General Assembly in even numbered years may enact bills raising revenue, bills making appropriations and may also enact bills pertaining to subjects designated in writing by the Governor during the first ten days of the ses-

sion, I hereby designate the following subjects at this time for appropriate actions:

"'1. Reapportionment of members of the General Assembly.

"'Respectfully submitted,

"'Steve McNichols, Governor.'"

Thus it is clear, from the very Response of the Governor and the General Assembly, that both knew that the matter of reapportionment had to be done in 1961 and 1962, that the census existed and was furnished to the general assembly in 1961, and it was then before them, that the Governor twice called upon the Assembly to apportion, that the Assembly recognized and recognizes in its response that it has a "mandate" to reapportion in 1961 and 1962, and that it introduced numerous bills and amendments to that end, but failed to enact any of them. It is utterly impossible in this situation to credit the contention that the duty is to be performed instead in 1963, or that the Assembly did not have the census data, because from its own showing it not only had the census data before it and recognized its duty, but did not agree on any method of performance and did not perform.

The "interpretation" which some members of this court would give to the plain language of the constitution "at the *session next following* an enumeration" amounts to an amendment: a change in important substance, and is definitely not an "interpretation" if words still have their accepted meaning. The "interpretation" so applied amounts to a far greater usurpation by the judiciary of an exclusive legislative function than would be involved if

this court were to apply a mathematical equation and order reapportionment on the basis thereof. By this "interpretation" we would amend the constitution as adopted by the people! To me this is unthinkable!

Even though the "interpretation" were to be adopted it would solve only fifty per cent of the problem and leave entirely untouched the very important provision of the United States Constitution, that no person shall be denied "equal protection of the law." In other words, the United States Constitution emphatically declares that under no interpretation of state law can one man's vote in this nation be worth eight times as much as another's, even though by a fantastic "interpretation" of a state constitution one might give that inequality a mask of legality when tested at the state level.

This court should give affirmative relief and breathe strength and vitality into the constitutions of the state and the nation! If a temporary inconvenience be visited upon the citizen in a single election let him place the responsibility squarely upon those whose failure to obey the fundamental law brought about the inconvenience. It would be a cheap price to pay to avoid the emasculation and destruction of constitutional rights. Suffice it to say that no consequence resulting from judicial action which upholds and supports an unquestioned constitutional right, can ever be as burdensome or dangerous as the ultimate consequence which follows judicial emasculation and destruction of the constitutional rights here involved.

I have reached the foregoing conclusions after painstaking study and am fortified in setting them forth by the firm conviction that thoughtful citizens everywhere are

more interested in the preservation of constitutional government than in avoiding spending a few more moments in the ballot booth in one election, when by doing so they gain for themselves and grant to all others equality of voting strength. I am confident that intelligent persons everywhere would approve affirmative action, the effect of which would be to prevent the disintegration and piecemeal collapse of constitutional government. I am convinced that the preservation of our constitutional rights means more to mass humanity than the desires of those who may seek to perpetuate the existence of an office for which there is no foundation in the constitution or any valid law.

I view with deep concern and sincere regret the results which flow from the failure of the court to act. By deftly sidestepping the issue which is presented, several hundred thousand voters in Arapahoe, Jefferson, Adams, Pueblo, El Paso, Boulder, Mesa and other populous counties, as well as those in the City and County of Denver, are told by their highest court that their effectiveness at the polls at the coming election is anywhere from one-third to one-eighth as great as that of citizens residing elsewhere, and that no action will be taken by the judiciary in time to prevent that result.

Under the record before us the violation of constitutional rights is clearly shown; the remedy to stop it is clearly available, and it involves the use of a power which only the judiciary can exercise. When the legislature fails to perform its constitutional duty to correct an inequality in voting effectiveness (as great as 8 to 1); when the judiciary compounds that omission by refusing to act in its official capacity to protect basic rights when it is clear that a remedy is available—just where shall we tell the

1 8th of a citizen to go in search of the 7 8th of his constitutionally protected right to voting equality!

As for me, I refuse to tell him that the constitution affords him to present protection. I know it does—if it is recognized! I refuse to tell him that the judiciary can do nothing about it. I know that this court could do something about it! The majority of this court, by inaction, tells this citizen in effect: "Go on home, my good man and forget about it for the time being. The constitution really doesn't mean anything in actual practice."

With what force I am able to command I protest! I am content to let those who understand the law pass judgment on my views!

FRANTZ, J., concurs in this dissent.

HALL, Justice (dissenting).

I respectfully dissent.

I do not share the views of any of my colleagues as expressed in the majority opinion of Mr. Chief Justice DAY or the dissenting opinion of Mr. Justice MOORE, and feel that it is proper for me to briefly outline my views.

We have before us for consideration the petition of one Harold Stein, who appears for himself and for "all other persons similarly situate." In his petition Stein sets forth facts upon which he predicates his claim for relief from this court. For himself and his fellow citizens he prays, in substance, that this court:

1. Convene the General Assembly for the purpose of reapportionment.

2. Require the Governor to convene the General Assembly for such purpose.

3. Prohibit the Secretary of State from "permitting the conduct of elections or certifying to office any person as elected to the General Assembly until there be such reapportionment * * *."

4. Prohibit the State Treasurer from paying to any member of the General Assembly of any of the emoluments of his office until there be reapportionment as provided by the Constitution of Colorado.

There is no prayer for general relief or any relief other than that above specified.

Having read the majority opinion and the dissenting opinion, I conclude that my associates, who subscribe thereto, all concede that for this court to grant any of the relief requested would be an invasion of the powers of the executive or the legislative branches of the government and beyond the powers delegated to the judiciary. I entertained and expressed those views when the petition was first presented and cast my vote to then deny the petition. Passage of time, reading of voluminous briefs, listening to elaborate and intriguing arguments and studying the aforementioned opinions serves only to bolster my original conviction that the rule to show cause should never have been granted and that the petition should now be dismissed.

I find nothing in the majority opinion indicating that

in 1963 or at any other time are any of the four members of this court who share in that opinion going to grant any of the relief requested by Mr. Stein. If my analysis is correct, then it would seem that orderly procedure dictates that Stein's petition be dismissed *nunc*.

Implicit in the statement in the majority opinion, "reserving final judgment herein on all issues * * *," is a suggestion, warning, or veiled threat that if the Governor, the General Assembly, the Secretary of State, and the State Treasurer do not meet the demands of Mr. Stein prior to June 1963, they will hear further from this court. I am of the opinion that those parties are entitled to go about the performance of their constitutional and statutory duties, answerable only to the People and their own consciences, untrammeled by threats or warnings from this court, no matter how hollow or impotent they may be.

Both Mr. Chief Justice DAY and Mr. Justice MOORE point out that, under our rules of civil procedure, we may grant relief other than that sought or warranted by the petition. I do not subscribe to that construction of the rules as applicable to class actions.

Here, we have Stein coming into court and asking for certain relief for himself and 1,800,000 other citizens. Possibly the other 1,800,000 desire the same relief as Stein and are happy to have him go forth as their Sir Galahad to bring about desired results. Their silence here is their consent. These 1,800,000 citizens may well be held accountable for, and bound by, Stein's failure to procure the relief they demanded—none can be held accountable for Stein's returning from the bargain counter with: (1) delay from the majority; (2) elections at large from the minor

ity. None bargained for such result. Neither Stein nor any of his 1,800,000 fellow citizens have had their day in court on either question. No one has suggested that relief (if such it may be called) of the nature granted by the majority or recommended by the minority be visited on 1,800,000 citizens who appear in court seeking relief entirely foreign to that granted or recommended.

Clearly, the People have not entrusted to the judiciary any powers or duties pertaining to reapportionment. They placed their trust in the General Assembly and not elsewhere. The People have the reapportionment for which they bargained—that provided by the Assembly, good, bad, or indifferent, or even none in the event of its failure to act. They are getting exactly that for which the Constitution provides. To thrust upon the People any form of reapportionment other than that for which they bargained does violence to their constitutional rights.

It is probably true that the People are not getting the reapportionment which they anticipated getting or hoped for, but they are getting legislative reapportionment and that is what is provided for in the Constitution.

Steps have already been taken by the People through proposed initiated measures looking toward other and different reapportionment. As I view it, such is the only method available to divest the General Assembly of its present powers and to relieve it of its present duties with respect to reapportionment.

Certainly the People have never evinced any desire to have the judiciary take over. All members of this court recognize this fact; however, Justice MOORE skirts the

problem by saying that: "The judiciary has inherent power to 'fashion relief' necessary to prevent violations of constitutional rights." With this statement I am in complete disagreement.

I am fully persuaded that this court is a branch of the government vested with enumerated powers only. Powers not granted to the legislature, the executive or the judiciary are reserved to the People. That to me is elementary and fundamental. I for one lay claim to *no* inherent powers. Not too long ago a President of the United States, presented with a troublesome problem, as are we, concluded that he possessed inherent powers which provided the desired solution. The judiciary promptly and thoroughly rejected his assumption or exercise of such authority as being foreign to our system of government, a government predicated on the delegation of powers by the People and retention by the People of powers not delegated.

The powers and duties of the Supreme Court are limited, well defined by the Constitution and enabling legislation. I find nothing therein remotely suggesting that this court has the power to step in and fill the breach occasioned by the failure of the executive or legislative branches of the government to perform their constitutional duties. The remedy rests in the hands of the People.

The petition should be dismissed.

Appendix E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 7501

ARCHIE L. DISCO, AND ALL OTHER REGISTERED VOTERS OF THE DENVER METROPOLITAN AREA, STATE OF COLORADO, SIMILARLY SITUATED

Petitioners,

v.

STEPHEN L. R. McNICHOLS AS GOVERNOR OF THE STATE OF COLORADO, TIM ARMSTRONG AS TREASURER OF THE STATE OF COLORADO, GEORGE BAKER AS SECRETARY OF THE STATE OF COLORADO, THE STATE OF COLORADO AND THE GENERAL ASSEMBLY THEREOF,

Respondents.

Civil Action No. 7637

WILLIAM E. MYRICK, JOHN CHRISTENSEN, ED SCOTT, GORDON TAYLOR, HENRY ALLARD, ANDRES LUCAS, JOHN L. KANE, WILLIAM J. WELLS, FRANK A. CARLSON, WILLIAM EPPINGER, ALLEN L. WILLIAMS, RUTH S. STOCKTON, KENNETH FENWICK, CHESTER HOSKINSON, and JOE B. LEWIS, individually and as citizens of the State of Colorado, residents in the Counties of Adams, Arapahoe, and Jefferson, and taxpayers and voters in the State of Colorado, for themselves and for all other persons similarly situate,

Plaintiffs and Petitioners,

v.

THE FORTY-THIRD GENERAL ASSEMBLY OF THE STATE OF COLORADO, HON. STEPHEN L. R. McNICHOLS, AS GOVERNOR OF THE STATE OF COLORADO; HON. TIM ARMSTRONG, AS TREASURER OF THE STATE OF COLORADO, AND HON. GEORGE BAKER, AS SECRETARY OF STATE, OF THE STATE OF COLORADO,

Respondents and Defendants

FEDERAL PLAN FOR APPORTIONMENT, INC., a Colorado corporation not for profit, Edwin C. Johnson, John C. Vivian, Joseph F. Little, Warwick Downing, Wilber M. Alter, as incorporators and directors thereof and individually and as citizens, residents and taxpayers of the State of Colorado, and John Doe, individually and as a citizen of the State of Colorado, a resident and inhabitant of the City and County of Denver, and a taxpayer of the State of Colorado, on behalf of themselves and for all persons similarly situate,

Intervenors.

Filed, United States District Court, Denver, Colorado, Aug. 10, 1962
G. Walter Bowman, Clerk

Messrs. Salazar and Delaney, Attorneys at Law, 304 Denver U.S. National Center, 1700 Broadway, Denver 2, Colorado, for Petitioners in Civil Action No. 7501; Honorable Duke W. Dunbar, Attorney General for the State of Colorado, Frank E. Hickey, Deputy Attorney General, and Richard W. Bangert, Assistant Attorney General, 104 State Capitol, Denver 2, Colorado, for Respondents in Civil Action No. 7501.

Charles Ginsberg, Esquire, George Louis Creamer, Esquire, 928 Equitable Building, Denver 2, Colorado, for Plaintiffs and Petitioners in Civil Action No. 7637; Honorable Duke W. Dunbar, Attorney General for the State of Colorado, Frank E. Hickey, Deputy Attorney General, and Richard W. Bangert, Assistant Attorney General, 104 State Capitol, Denver 2, Colorado, for Respondents and Defendants in Civil Action No. 7637.

Charles S. Vigil, Esquire and Richard S. Kitchen, Sr., Esquire, 2155 First National Bank Building, Denver 2, Colorado, for Interveners.

Philip J. Carosell, Esquire, 430 Majestic Building, Denver 2, Colorado, Amicus Curiae.

MEMORANDUM OPINION

Per Curiam.

The above cases were consolidated for trial and disposition. The actions in each instance are on behalf of the

plaintiffs for themselves and others similarly situated as taxpayers and qualified voters of the State of Colorado.

In Civil Action No. 7501 it is alleged that the plaintiff is a property owner and a registered voter who resides in Denver. He seeks to compel certain state officers to take specific affirmative action for the purpose of complying with the Fourteenth Amendment to the Constitution of the United States.

In Civil Action No. 7637 the plaintiffs allege that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States guarantees equality of franchise and that the present legislative apportionment statutes[1] deprive them of the equality of franchise and vote which the Fourteenth Amendment guarantees, whereby these statutes are in conflict therewith; that the statute as applied to the 1960 federal census reveal gross inequalities and disparities in voting rights; that in some instances the disparities reach a proportion of eight-to-one.

Defendants, the Governor, State Treasurer, Secretary of State and General Assembly of the State of Colorado, have filed answers in which they challenge the jurisdiction of this Court, assert their own immunity from suit, and deny any unconstitutional discriminations.

Certain proponents of an initiated measure have, with the permission of the Court, intervened. From their complaint it appears that they are sponsoring an amendment to the Colorado Constitution which will appear on the ballot in the general election to be held in November, 1962. This measure, according to the allegations of the petition

[1]Sections 63-1-2, 63-1-3 and 63-1-6, C.R.S. 1953.

and the evidence adduced at the hearing, would constitutionally establish the senatorial districts and would at the same time increase the membership of the Senate, giving additional senators to more populous districts and would authorize the districting of the House upon a population basis in the year 1963 and after each federal census thereafter. From the petition it also appears that another amendment[2] will appear on the November ballot. This would provide for the districting of both houses by a commission on a population basis, subject to review by the Supreme Court of Colorado. The prayer of interveners is that the Court dismiss these actions or continue the consolidated cause until after the November election, or, declare invalid Section 47 of Article V of the Colorado Constitution which, according to interveners, forbids the subdivision (by the Legislature) of legislative districts[3].

The Colorado legislature, which is called the General Assembly, is bicameral in character. The Senate has 35 members, elected for four-year staggered terms from 25 senatorial districts which are created by statute[4]. The House of Representatives has 65 members who are elected for two-year terms from 35 districts which are created by statute[5].

The apportionment provision in the Colorado Con-

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[2] No. 8. The amendment sponsored by interveners is No. 7 on the ballot.

Since these measures are on the November ballot and could not apply to the upcoming Assembly, and since both require implementation, they would not take effect until 1964.

[4] Colorado Constitution, Article V, section 3 and sections 63-1-3, 63-1-4, C.R.S. 1953.

[5] Colorado Constitution, Article V, section 3 and section 63-1-6, C.R.S. 1953.

stitution[1] authorizes the Assembly to create districts and to fix ratios, but requires that this be done with reference to federal or state enumerations. It provides that after each census made as provided by the State, or under the authority of the United States, the General Assembly "shall revise and adjust the apportionment for senators and representatives on the basis of such enumeration according to ratios to be fixed by law."

In an original proceeding in the Supreme Court of Colorado, No. 20240, *In the Matter of Legislative Reapportionment*, that court, in a decision filed July 6, 1962, construed the provision of the Constitution of Colorado in respect to the mandate to the Legislature to reapportion following the United States census to not require that apportionment take place in the session immediately following the census. The holding was that the "session next following an enumeration made by the authority of the United States" does not require reapportionment at the session *immediately* following the census report and as applied to the case before the Court held that "such legislation is not mandatory until the Forty-fourth General Assembly convenes."[2]

The federal constitutional question here presented was not considered, but the Court noticed the fact that the mentioned initiative measures will appear on the ballot in November and in recognition of this and of the possible defeat of both measures, the court retained jurisdiction

[1] Article V, section 45.

[2] That is, until January, 1963.

[3] In which case the Forty-fourth General Assembly would have to act on the issue. Both of these constitutional amendments would require legislative implementation.

until June 1, 1963, granting leave to reopen at that time if no constitutional amendment or legislative apportionment has meanwhile been adopted.

The record discloses that since Colorado first achieved statehood there has been a modicum of apportionment, either real or purported, and also that there have been several abortive attempts. Since 1876 the General Assembly has been reapportioned, or redistricted, five times: in 1881, 1901, 1913, 1932 and 1953. The 1953 statutes are now in effect. Measures were introduced in the last General Assembly[10] to reapportion with reference to the 1960 federal census report. These measures failed to pass. One initiated reapportionment act has been passed during the period since 1876. This measure was adopted in 1932 but following its adoption the General Assembly passed its own legislative reapportionment act in 1933 which was designed to thwart the operation of the initiated act. This latter act was held by the Colorado Supreme Court to be unconstitutional[11].

Factual data presented at the trial reveals the existence of gross and glaring disparity in voting strength as between the several representative and senatorial districts. Colorado's present population, determined by the 1960 federal census, is 1,753,947. During the decade from 1950 to 1960 there was a percentage increase amounting to 32.4. During this period the urban areas increased 55.5 per cent, and there was a decrease in the rural areas amounting to 6.6 per cent. The population in 36 of the 63 counties decreased. Some specific examples of the disproportion are

[10] Section 63-1-1, supra.

[11] The Forty-third.

[11] **Armstrong v. Mitten**, 95 Colo. 425, 37 P. 2d 757.

here mentioned: The most exaggerated example is in a district (having a single representative) which was shown to have a population of only 7,867 as compared with another representative district (having two representatives) for a population of 127,520 people. Similar disparity exists in the senatorial districts. A single senator represents a district of 127,520 people while another senator has 17,481 people in his district. A senator from one of the seven most populous districts represents on the average 90,309 constituents; a senator from one of the eighteen least populous districts represents on the average 29,013 persons. A representative from one of the seven most populous districts represents on the average 46,342 while a representative from one of the twenty-eight less populous districts represents an average of 15,993 persons. Also noteworthy is the fact that 29.8 per cent of the 1960 population is capable of electing a majority of the Senate, and 32.1 per cent of the population is capable of electing a majority in the House of Representatives. Stated differently, it can be said that 562,741 persons elect 33 representatives, a majority, whereas 1,190,306 persons elect 32 representatives, a minority of the House. Similarly, in the Senate 556,912 voters elect 19 of the 35 senators, whereas 1,207,035 elect the remaining 16 senators.

The inevitable effect of the present Apportionment Act[12] has been to develop severe disparities in voting strength with the growth and shift of population. It provides that the ratio for the apportionment of senators shall be one for each senatorial district for the first 19,000 of population and one for each additional 50,000 or fraction over 48,000. The ratio fixed for the House is one representative for the first 8,000 of population and an additional

[12] Section 63-1-2

representative for each additional 25,000 or fraction over 22,400 of population. The inevitable consequence of these ratios is the kind of disparity which now exists.

Three questions need to be discussed at this time. They include: *First*, the issue of exercise of jurisdiction; *secondly*, the question whether the disparity in voting strength which is described above sufficiently establishes the unconstitutionality of the districting statutes as applied to these plaintiffs; and *thirdly*, the question whether upon the basis of the present showing—the circumstances before us—we are justified in now granting relief.

I.

THE JURISDICTION QUESTION

The plaintiffs seek "to redress the deprivation, under color of * * * State law * * * of * * * right, privilege of immunity secured by the Constitution of the United States * * *," and thus they bring themselves within the terms of Title 28 U.S.C. §1343(3). The action seeks an injunction against enforcement of state statutes upon the ground of their unconstitutionality pursuant to Title 28 U.S.C. §2281 and requires a three-judge court created pursuant to Section 2284. *Baker v. Carr*[1] holds that a claim such as the present one, based as it is upon alleged denial of equal protection of the laws arising from the operation of a state statute creating disproportionate legislative representation, constitutes a justiciable issue; that the plaintiffs in such case assert a right cognizable by a federal district court. This decision eliminates any doubt as to jurisdiction of this Court to hear and determine the cause. The argu-

[1] 369 U.S. 186, 82 S.Ct. Adv. Sheet 691, the decision of the Supreme Court which has given rise to these suits.

ment of the Attorney General that the Colorado Supreme Court has preempted jurisdiction by first hearing the controversy, is without merit in view of the fact that the Supreme Court of Colorado has refrained from even considering the issue of infringement of the plaintiffs' federally-guaranteed constitutional rights. The only question of a jurisdictional nature is whether under the circumstances here presented this Court should as a matter of policy abstain from the *exercise* of jurisdiction. *General Investment & Service Corporation v. Wichita Water Company*, 10 cir., 236 F. 2d 464, lays down the standards applicable to acceptance or abstinence. It is there said:

> " " " The principle is well established and without dispute that under the rule of comity under our dual system of Government in cases involving state laws, rules or regulations, equitable considerations will under certain circumstances require federal courts to stay their hands where the parties have an adequate, speedy and complete determination of the controversy in a state tribunal. No cases need be cited to support this statement. It is recognized without exception. The Supreme Court has held that where there is pending in the federal court a case involving the construction of a state law and if one construction will remove the federal question a federal court should stay its hand, retain jurisdiction and relegate the parties to the state court to first seek a construction of the statute " " "

See also *Alabama Public Service Commission v. Southern Ry. Co.*, 341 U.S. 341; 71 S. Ct. 762; *Corporation Commission of Oklahoma v. Cary*, 296 U.S. 452, 56 S. Ct. 300; *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098; *Louis-*

iana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 79 S. Ct. 1070.

The considerations which demand abstinence are not present in the instant case. Here, the General Assembly of the State of Colorado has repeatedly refused to perform the mandate imposed by the Colorado Constitution to apportion the legislature. The likelihood that the unapportioned General Assembly will ever apportion itself now appears remote. The Supreme Court of Colorado, while retaining jurisdiction of the subject matter of the controversy presented to it, has postponed further consideration of the cause until June, 1963. Under these circumstances, we must conclude that the parties do not, at least at present, have an adequate, speedy and complete remedy apart from that asserted in the case at bar and thus grounds for abstention are at this time lacking.

Nor is there any merit in the contention of the Attorney General that the suit is against the State. The action is against state officers. It seeks injunctive relief against violation of the federal constitution, and thus sovereign immunity is not an issue. *Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 72 S. Ct. 321; *Harrison v. St. Louis & Santa Fe R. Co.*, 232 U.S. 318, 34 S. Ct. 333.

II.

THE INEQUALITY IN VOTING STRENGTH AS SHOWING UNCONSTITUTIONALITY OF THE DISTRICTING STATUTES

Baker v. Carr does not pass directly on the validity of the apportionment reflected by the Tennessee Districting Statutes. It merely recognizes that allegations of debasement of franchise growing out of disproportionate voting rights tender issues of constitutionality cognizable by federal courts. No guidelines or criteria are laid down for determining the extent or level of disproportion necessary to constitute infringement of the Equal Protection Clause of the Fourteenth Amendment. Thus, the body of case law construing the Equal Protection Clause applies.

It is, of course, axiomatic that absolute equality between classes is not essential to validity under the Equal Protection Clause, but a rational basis for the legislative distinctions is necessary.

The test usually employed for determining whether the discrimination is valid or invalid—rational or irrational—is whether the discrimination is "invidious."[9] In his concurring opinion,[10] Mr. Justice Douglas reiterates the "invidious" test as the proper one: (82 S.Ct. Adv. sheet, p. 724).

> "The traditional test under the Equal Protection Clause has been whether a State has made 'an invidious discrimination,' as it does when it selects 'a particular race or nationality for oppressive treatment.'

[9] (Among the definitions given by Webster for this somewhat ambiguous term are, "of an unpleasant nature; hateful; obnoxious.")

[10] In **Baker v. Carr**, supra.

See Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 1110, 1113, 86 L. Ed. 1665. Universal equality is not the test; there is room for weighting. As we stated in Williamson v. Lee Optical Co., 348 U.S. 483, 75 S. Ct. 461, 465, 99 L. Ed. 563, 'The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.'"

In *Moss v. Burkhart, et al.*, No. 9130 in the United States District Court for the Western District of Oklahoma, the disparity in voting strength between citizens of one county as compared with citizens of another county exceeded in some instances ten-to-one. The court there found that both branches of the Legislature had consistently disregarded the State Constitution with respect to apportionment.

The Court went on to note that one vote for a representative in one county was equal to fourteen votes for the same offices in another county, and eleven votes in still another county. The Court said that the disparity existing in the senatorial districts was even greater. On the basis of this evidence it was concluded that the discrimination was gross and egregious, "and without rational basis or justification in law or fact." The Court proceeded to hold that the apportionment act as it then existed in Oklahoma was "invidiously discriminatory" as against the plaintiff in the action and the class of voters which he represented.[6]

The Supreme Court of Michigan, in *Scholle v. Hare*,

[6] Final judgment has been postponed until April, 1963 to give the Oklahoma legislature a further opportunity to reapportion.

31 Law Week 2059, found invidious discrimination in a less aggravated fact setting. It was there said:

> "* * * that any law of our State giving some citizens more than twice the votes of other citizens in either the primary or general election would lack constitutional equality so as to void that law. * * * When a legislative apportionment provides districts having more than double the population of others, the constitutional range of discretion is violated. This is not to say that less than such 2 to 1 ratio is constitutionally good. It is to say only that peril ends and disaster occurs when that line is crossed."

At the hearing the plaintiffs offered exhibits showing the population of the state, the counties, and the senatorial and representative districts and rested their case on the proposition that such exhibits show such a disparity in representation as to establish invidious discrimination and to destroy any claim of rationality in the apportionment of the legislature. The defendants asserted that the legislative districts are justified by topographic, geographic, historical and economic factors which have been applied in a rational manner but they presented no evidence to sustain their position. The intervenors called two witnesses, each of whom recognized a malapportionment of the House, and with general statements defended the apportionment of the Senate. Their testimony with regard to the Senate is weakened by their own initiated proposal which makes changes in the apportionment of that body. In effect, we are left with a situation where one side says that the population figures show invidious discrimination and the other side

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Although the Michigan Court held the Senate districting system unconstitutional, the Supreme Court stayed execution on the order enjoining the primary election

says that the disparities so shown are not sufficient to overthrow the presumption of constitutionality.

We recognize that a statute is presumed constitutional, and that he who attacks the constitutionality of a statute bears a heavy burden.[11] The population statistics presented by plaintiffs and challenged by no one, show the disparities we have heretofore noted. They are of sufficient magnitude to make out a *prima facie* case of invidious discrimination which rebuts the presumption. Accordingly, the defendants were obliged to show that there exists some rational basis for these disparities.

To sustain the rationality of the present districting of the Colorado General Assembly we are left with those facts which may be judicially noticed. We know that Colorado is a large state having two counties with an area of over 4,000 square miles and a number of counties of more than 2,000 square miles in size. We know that the east half of the state is a land of plains and the west half a land of mountains. The population is now concentrated in the metropolitan centers of Denver, Pueblo and Colorado Springs, all located in a narrow strip east of the Continental Divide. The economic interests of the farmers and miners, the stock raisers and the oil producers, the merchants and the consumers, the employers and the employees, industry and recreation, the mountains and the plains, the large cities and the small towns, have many differences. The Colorado statutes reflect that traditionally the districting of the legislature has favored certain areas with

[11] **Fleicher v. Peck**, 6 Cranch (10 U.S.) 87, 3 L. Ed. 162; **Dartmouth College v. Woodward**, 4 Wheat. (17 U.S.) 518, 4 L. Ed. 629; **Powell v. Pennsylvania**, 127 U.S. 678, 8 S. Ct. 992, 32 L. Ed. 253; **Nicol v. Ames**, 173 U.S. 509, 19 S. Ct. 522, 43 L. Ed. 786; **Fleming v. Nestor**, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435.

a great emphasis on the mining counties which was changed, at least partially, by the 1932 initiated measure which increased the representation of the eastern farming counties. We know too, that in the last twenty years the population has become more and more concentrated in the metropolitan areas.

These matters of general knowledge may justify disparities in legislative districts. They do not, of themselves, sustain the rationality of the legislative districts as they now exist. Reliance on generalities is misplaced when a case must be decided on the basis of specific situations.

We are asked to stay our hands until the State has acted through its machinery. The principle that there should be a minimum of judicial intrusion by federal courts into the governmental affairs of a state needs no amplification. We are aware that the integrity and independence of state governments must be preserved and that the states must have the widest possible latitude in the conduct of their internal affairs and in the solution of their own problems. Of comparable importance is the protection of the individual in the enjoyment of his constitutional rights and privileges. The sensitive balance which must be maintained between the protection of individual rights and the preservation of state integrity cautions against precipitate action.

III.

WHETHER A DECREE SHOULD BE ENTERED NOW

There are additional considerations which bear on whether a decree should be entered at this time adjudicating the constitutionality of the Colorado districting statutes and decreeing a scheme of apportionment in the event of a holding of unconstitutionality.

The record before us is, as shown above, inadequate. The trial of the case was completed in one day and the only testimony offered was that on behalf of the interveners. Although plaintiffs offered a number of exhibits showing the extent of voter strength disproportion, there was no evidence describing possible plans for remedying invidious discrimination should the same be found. Considering the lack of substantial evidence of this character, it would be presumptuous for this Court to devise a plan on its own initiative.

Secondly, in view of the magnitude of the task, the time is wholly inadequate. The political parties have now held their assemblies at which candidates have been designated to appear on the ballot at the primary election which is scheduled to take place on September 11, 1962. Any positive orders which we might enter at this time would likely interfere with this election and would have a disruptive effect. The time available is so insufficient as to render it impractical, if not impossible, to now deal with the merits of the case.

In the light of the foregoing, we conclude that final adjudication should be postponed until a further hearing has been held on all issues.

We further conclude that the case presented is not one for temporary injunctive relief and that there should be no impediment to the orderly conduct of the election or interference with the electorate in the free expression of their opinions on the initiated measures at the coming election; accordingly, it is

ORDERED that the cause be continued until on or about November 15, 1962. On or about that date a pre-trial hearing shall be held, and soon thereafter a further trial on the merits. It is

FURTHER ORDERED that all motions for temporary injunctions be denied.

Notices of the exact date and hour of further hearings will be furnished at a later date.

DATED at Denver, Colorado, this tenth day of August, A.D. 1962.

BY THE COURT:

JEAN S. BREITENSTEIN, Judge
United States Court of Appeals

ALFRED A. ARRAJ, Chief Judge
United States District Court

WILLIAM E. DOYLE, Judge
United States District Court.

Office-Supreme Court, U.S.
FILED
JAN 3 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 635

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, COLORADO, ET AL., *Appellants*,

vs.

THE CITY AND COUNTY OF DENVER, COLORADO, ET AL., *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION TO DISMISS OR AFFIRM

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IN THE

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THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, COLORADO, ET AL., *Appellants*,

vs.

THE CITY AND COUNTY OF DENVER, COLORADO, ET AL., *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION TO DISMISS OR AFFIRM

Appellees, City and County of Denver, State of Colorado, et al., move to dismiss or affirm the appeal herein pursuant to Rule 16 of the Revised Rules of this Court, upon the ground that no substantial federal question is involved herein.

Questions Presented

1. Whether Denver is proscribed by the equal protection clause of the 14th Amendment to the United States Constitution from accepting a voluntary annexation petition from landowners of a tract of land in an adjoining county, Jefferson, under annexation provisions which have been upheld by the Colorado Supreme Court, without submitting the question to all of the qualified electors of Jefferson County for approval?

2. Whether federal constitutional questions not raised below may be raised for the first time in this Court?

Statement of the Case

The owners of a tract of land in Jefferson County, Colorado, contiguous to the City and County of Denver, have under the procedures specified in 1953 Colorado Revised Statutes,[1] applied to the legislative body of the City and County of Denver for annexation. Since Denver is, by Article XX of the Constitution of Colorado,[2] both a city and a county, this annexation involves a disconnection from Jefferson County, and a territorial attachment to the City and County of Denver. Denver passed an appropriate ordinance accepting the annexation. There are no creditors with vested or any rights who have objected. There are no bondholders or others relying upon the security of the affected property who have appeared or are adversely affected.

The objection comes only from the Board of County Commissioners of Jefferson County, Colorado, who in their official capacity and as individuals purportedly representing all the other citizens of the County, contend the attempted annexation is contrary to the equal protection provisions of the Fourteenth Amendment to the United States Constitution.

The proceeding began in the County Court of Jefferson County, where appellants contended the attempted annexation was contrary to various sections of the Colorado Constitution and various State statutes.[3] Therein they also

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[1] Chap. 139, Art. 11, §§ 1-9, See Jurisdictional Statement, Appendix C.

[2] See Jurisdictional Statement, Appendix B.

[3] Case Numbers 20021 and 19991, County Court, Jefferson County, Colorado. The cases were consolidated by the Supreme Court of Colorado. See Jurisdictional Statement, Appendix A, page 28.

contended their rights under Article 14, Section 1, of the United States Constitution were infringed.

No evidence was taken in the County Court since that Court granted a motion to dismiss. Under familiar procedural rules the facts alleged in the complaint had to be, and were, for the purposes of the motion, taken as true.

The County Court held as a matter of law that the complaint did not entitle appellants to relief. These objections were renewed in the Supreme Court of the State of Colorado and the same were therein struck down seriatim in a carefully prepared unanimous opinion. That Court's unanimous opinion rejected the contention that the annexation violated the Constitution of Colorado as well as the contention that it violated the equal protection clause of the Fourteenth Amendment. Finally, in their rehearing petition (which was denied without opinion) they contended to the Colorado Supreme Court that this Court's pronouncements in *Baker* v. *Carr*, 369 U.S. 186, had been ignored. In this Court they now expand their objections to include the due process clause[4] and claim hypothetically that the General Assembly, scheduled to convene in January 1963 might conceivably enact annexation legislation which would deprive them of equal protection of the laws guaranteed to them by the Fourteenth Amendment of the United States Constitution.[5]

Accordingly, there is now presented the corollary question of whether alleged constitutional issues raised for the first time in this Court may be brought forward for consideration at this time.

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[4] See id. at page 9, First Question, page 10, Second and Third Questions.

[5] See id. at page 14, Sixth Question.

ARGUMENT

No Substantial Federal Question Is Raised By This Appeal

1. *The Fourteenth Amendment Is Not Violated By The Provisions Of The Constitution Of Colorado Authorizing Annexation Of Property To Denver.*

The 1953 Colorado Revised Statutes [6] permit a contiguous area to be annexed by any municipality upon application to the municipality by the owners of more than 50% of the area, together with the consent of more than 50% of the landowners residing in the area. This annexation was thus initiated by the people who seek annexation, and not by Denver as appellants would have this Court believe. Accordingly, the City and County of Denver is not forcing an unwanted annexation on anyone. Denver's authority to accept an annexation petition, as a City, is given it by Article XX of the Constitution, adopted in 1902, and the area so annexed becomes a part of the City and County of Denver.

Article XIV, Section 3, of the Colorado Constitution, adopted in 1876, but made inapplicable by Article XX, Section 8, so far as Denver is concerned, does not permit a part of a county to be stricken off and added to an adjoining County without the question first being submitted to the qualified voters of the county from which the territory is proposed to be stricken off and unless a majority of the qualified voters of said county voting on the question vote therefor. Appellants claim this provision overrides Article XX adopted in 1902, and if it does not, then said Article XX is in violation of the due process and equal protection clauses, and discriminates in favor of Denver by

[6] Chap. 139, Art. 11, §§ 1-9.

permitting it to change the county locus of property without a vote of the people of the county affected.

That said Article XX does override Article XIV, Section 3, is settled not only by the express provisions of Section 8 of Article XX, but also by the Colorado Supreme Court's unanimous opinion herein. This construction of a state constitution is binding upon this Court.[7] There only remains for consideration the narrow issue of whether such a construction contravenes the due process or equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and the Colorado Supreme Court rejected this contention also.

2. *Jefferson County, And Its Officials, Have No Fourteenth Amendment Rights They Can Maintain Against The State Of Colorado.*

The Complaint in this case is by the County of Jefferson, and its officials, against the exercise of political power by the State of Colorado, through its Constitution and a properly adopted statute, which clearly authorizes the annexation herein complained of. A review of the constitutional and statutory provisions involved, demonstrates that no violation of the Fourteenth Amendment is involved in the Annexation herein complained against.

In adopting Article XX the people of Colorado did not give the City and County of Denver any unilateral power to change property from one county to another. The amendment and the general statutes merely permit it to honor an annexation request.

The Supreme Court of Colorado has held that counties are merely subdivisions of the State and their powers are

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[7] *Jefferson Branch Bank* v. *Skelly*, 1 Black (U.S.) 436, 443; *Morehead* v. *New York* 298 U.S. 587, 609; *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64.

limited to those specifically granted by the State.[8] The rights exercised over the area within its boundaries by the county are political rights—also the power is a political power. Neither the county nor the inhabitants of the county possess vested property rights in the county system, in the county government, or in the county boundaries, nor a right to live in any particular county of the state. The right here is not a vested property right of a person against his government which is protected by the Constitution of the United States. A political right conferred by law upon a subdivision of the state is not a vested right against the government, which, in this case, because it involves the state Constitution, is the people themselves. The Court was fortified by a specific section of Article XX declaring all conflicting constitutional provisions to be inapplicable to Denver.[9] In so doing it adhered to its own pronouncements in *People ex rel Simon* v. *Anderson*, 112 Colo. 558, 151 P. 2d 972 (1944), and *People* v. *Cassiday*, 50 Colo. 503, 117 Pac. 357 (1911), appeal dismissed 223 U.S. 707.

The equal protection clause was not designed to insulate state instrumentalities, such as counties, from state action, and as counties they do not have privileges or immunities which they may invoke contrary to the will of their creator. "A municipal corporation, created by a state for better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Williams* v. *Baltimore*, 289 U.S. 36, 40; see also *Hunter* v. *Pittsburgh*, 207 U.S. 161. As this Court long ago held in *Laramie County* v. *Albany County*, 92 U.S. 307, 311, political subdivisions of a state cannot sustain their privileges or even their existence upon

[8] *Colburn* v. *Board of Commissioners of El Paso County*, 15 Colo. App. 90, 61 Pac. 241 (1900).

[9] See Jurisdictional Statement at 54.

the basis of any contract with the state. Nor do they have any contract rights with the state solely by reason of their relationship to it. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 343. "'. . . [T]he Equal Protection Clause relates to equality between persons, as such, rather than between areas'" and "territorial uniformity is not a constitutional requisite." *McGowan* v. *Maryland*, 366 U.S. 420, 427. Nor do the appellants as individuals have any contract right to the continued maintenance of their county or its powers in unaltered form. *Hunter* v. *Pittsburgh*, *supra*.

That Denver is the only county exempted by Article XX from the voting requirements of Article XIV, Section 3 does not constitute a denial of equal protection. *Hayes* v. *Missouri*, 120 U.S. 68. The Colorado Supreme Court has consistently noted that such a classification is neither arbitrary nor unreasonable, and has adhered to that position again in this proceeding.

It has long been settled that a classification, even though discriminatory, is not arbitrary or violative of the Equal Protection Clause if any state of facts reasonably can be conceived that would sustain it. *Allied Stores* v. *Bowers*, 358 U.S. 522, 528.

The Colorado Supreme Court has for some sixty years considered that the people themselves had the right to set up a separate classification for Denver as a capitol city and as a growing population center by a separate constitutional provision. See *People* v. *Sours*, 31 Colo. 369, 74 Pac. 167 (1903). The record in this case wholly fails to support any claim that the classification so fixed infringes the equal protection clause.

Finally, appellants claim the annexation deprives them of property without due process of law, a point raised for the first time in this Court, thus raised too late. *White River Company* v. *Arkansas*, 279 U.S. 692, 699-700; *Hiawas-*

see River P. Co. v. Carolina-Tennessee P. Co.: 252 U.S. 341. The County Commissioners do not, in either their official or private capacities, own any part of the area seeking annexation, and hence they are not deprived of any property or other rights either with or without due process. *Hunter v. Pittsburgh, supra.*

In passing upon a similar problem the Supreme Court of Alaska in *Fairview Public Utility District v. City of Anchorage*, 368 P. 2d 540 (not yet officially reported) said at page 546:

> "Those who reside or own property in the area to be annexed have no vested right to insist that annexation take place only with their consent. The subject of expansion of municipal boundaries is legitimately the concern of the state as a whole, and not just the local community. There has been no infringement or deprivation of the rights protected by the Fourteenth Amendment."

An appeal from this decision was dismissed on October 8, 1962 by this Court. 83 S. Ct. 39.

3. *The Contention That A State Statute Has Preference Over The State Constitution Lacks Merit.*

The appellants contend that the provision of the Colorado Constitution, Article XX, which authorizes Denver to accept for annexation, from Jefferson County this property here involved, violates a Colorado Statute relating to school districts.[10]

Article IX, Section 2, of Colorado's Constitution requires the General Asembly to provide a uniform system of free public schools for the state. This Article was

[10] Acts of 1957, Chap. 123; Art. 25 439, Colo. Rev. Stats. 1953.

adopted by the people of Colorado in 1876. Article XX was added to the Constitution by the people of Colorado in 1902, and Section 7 thereof specifies that the City and County of Denver (created as a City and County by said Article XX) shall always constitute one school district.[11] Thus when adjoining land is annexed to Denver it becomes a part of the Denver School District. Section 8 of said Article XX also declares inapplicable to Denver any inconsistent or conflicting constitutional provisions.[12]

The appellants content that Article XX contravenes the school district organization act of 1957, Chapter 123, Article 25, Section 39, 1953 Colorado Revised Statutes, as amended, the general school statutes, in that the effect of Article XX is to exempt Denver from its provisions, and this, they claim, constitutes a taking of their property without due process of law, deprives them of equal protection of the laws under the Fourteenth Amendment and violates the Enabling Act of Colorado. Yet Section 7 of Article XX expressly provides that except as limited by the requirement that Denver shall always constitute one school district the general school laws of Colorado apply to it.[13]

Appellants deftly side step the time honored principle that the Constitution prevails over inconsistent statutory enactments. The Fourteenth Amendment is not infringed, merely because the People of Colorado declared in Article XX that Denver should always constitute one school district.

The contention that a state statute is superior to Constitutional provisions is, on its face, flagrantly lacking in substance.

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[11] See Jurisdictional Statement, Appendix B, at 53.
[12] Id. at 54.
[13] Id. at 53.

4. Automatic Altering of District Boundaries by the Annexation Does Not Violate the Equal Protection Clause.

Appellants further contend that Article XX of the Colorado Constitution grants to Denver the power to alter congressional, legislative and judicial district boundaries whenever it annexes a piece of land and this deprives them of equal protection of the laws. These are things, however, which the legislature and the state itself can do conditioned only upon the present statutory and constitutional provisions requiring these districts to conform to county lines. That these district boundaries are altered when land is detached from one county and added to another when Denver accepts a voluntary annexation petition, does not, as appellants contend, give Denver additional power not possessed by other counties. The fact that the district boundaries change, follows from acts of the legislature or of the Constitution itself, not from Denver's acceptance of an annexation request.

5. The Reapportionment Questions Now Pending Before Colorado and Federal Courts and Possible Legislation Are Not Involved In This Case.

For vague undefined reasons, appellants seek to inject *Baker* v. *Carr*, 369 U.S. 186, into this case but the voting rights of individuals involved there, and the question of annexation of part of a county to another city and county involved here, are entirely different. The property here was uninhabitated when the annexation petition was filed so no dilution of or increase in voting rights of any voter was affected. To put the facts into focus the status of reapportionment in Colorado will be reviewed briefly to demonstrate the irrelevance of reapportionment to the instant case.

Article V, Section 45, of the Colorado Constitution [14] requires the legislature to revise and adjust the apportionment for State senators and representatives on the basis of a census according to ratios to be fixed by law. The legislature last reapportioned itself in 1953, Chapter 63, Article 1, Section 1, 1953 Colorado Revised Statutes, as amended.

Subsequent to this Court's decision in *Baker* v. *Carr*, 369 U.S. 186, two cases were filed in Colorado, one an original proceeding in the Colorado Supreme Court, *Stein* v. *General Assembly*,[15] the other *Lisco* v. *McNichols as Governor*,[16] in the United States District Court for the District of Colorado, the object of both suits being to compel a reapportionment in Colorado. About the same time two initiated constitutional reapportionment matters were placed on the ballot in the November 1962 election.[17]

The Colorado Supreme Court took jurisdiction but concluded, in view of the pendency of the initiated amendments on the ballot, and since the Legislature had not had a plenary session since the last census results were certified to it in 1960, to wait until June 1, 1963, to take further action in the matter. The statutory federal court also declined temporary injunctive relief so as not to interfere with the orderly conduct of the election or the free expression by the electorate on the initiated amendments, but set a further hearing to take place after the general election had been held.

The voters did approve one of the initiated constitutional amendments [18] and the General Assembly must now re-

[14] Amendments to Article V of the Colorado Constitution were adopted by the electorate in the November 1962 election. See Appendix A, attached hereto.

[15] See Jurisdictional Statement, Appendix D.

[16] Id., Appendix E.

[17] See *supra* Note 14.

[18] See *supra* Note 14.

apportion itself according thereto within forty-five days after their 1963 session commences on January 2 or suffer the penalties therein provided.

The validity of this constitutional amendment has been challenged in a supplemental complaint filed with the same statutory federal court and a pretrial conference has been set for February.

The valid annexation herein is not in conflict with *Baker* v. *Carr.* When the legislature acts or fails to act and the two courts who are still considering the reapportionment problems hand down final decisions, it will be time then to consider the voting rights questions which are found to exist or not exist. Such rights are not involved here even by the greatest stretching of imagination.

In this connection the appellants ask this Court in this case to invalidate all the statutory laws of Colorado since the legislature last reapportioned itself in 1953. The Iowa Court refused to embark on that chaotic course and this Court sustained it in *City of Cedar Rapids* v. *Cox*, 252 Iowa 948, 108 N. W. 2d 253, 262 (1961), appeal dismissed, 368 U.S. 3.

6. *An Advisory Opinion On Future Annexation Legislation Will Not Be Given*

Appellants in their Sixth Question, want this Court to rule hypothetically that any annexation legislation which might be passed in the upcoming legislative session would likewise be invalid. This Court long ago declined to

> ". . . give advisory opinions which cannot affect the rights of the litigants in the case before it." *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. 416, 418.

7. Questions Presented For The First Time In This Court Are Raised Too Late

In their Questions 1, 2 and 3 appellants for the first time now assert they have been denied due process of law by the annexation herein attacked. That such contentions are intertwined with their other assignments indicates appellants' lack of confidence in them. In any event, it is too late to raise them for the first time in this Court.

> "It does not appear, however, from the record that this constitutional question was presented in or passed upon by the Supreme Court of the State; and as it was sought to raise this question for the first time by assignments of error in this Court, it is necessarily excluded from our consideration." *White River Lumber Co.* v. *Arkansas*, 279 U.S. 692, 700. See also *Edelman* v. *California*, 344 U.S. 357.

Conclusion

For the reasons given above, the appeal should be dismissed or the decision of the Colorado Supreme Court should be affirmed as no substantial federal question is presented herein.

Respectfully submitted,

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APPENDIX A

AN ACT TO AMEND ARTICLE V OF THE STATE CONSTITUTION PROVIDING FOR THE APPORTIONMENT OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE GENERAL ASSEMBLY AND PROVIDING FOR SENATORIAL DISTRICTS AND REPRESENTATIVE DISTRICTS

SECTION 1. Section 45, 46, and 47 of Article V of the Constitution of the State of Colorado are hereby repealed and new Sections 45, 46, 47 and 48 of Article V are adopted, to read as follows:

Section 45. GENERAL ASSEMBLY. The general assembly shall consist of 39 members of the senate and 65 members of the house, one to be elected from each senatorial and representative district. Districts of the same house shall not overlap. All district shall be as compact as may be and shall consist of contiguous whole general election precincts. No part of one county shall be added to another county or part of another county in forming a district. When a district includes two or more counties they shall be contiguous.

Section 46. HOUSE OF REPRESENTATIVES. The state shall be divided into 65 representative districts which shall be as nearly equal in population as may be.

Section 47. SENATE. The state shall be divided into 39 senatorial districts. The apportionment of senators among the counties shall be the same as now provided by 63-1-3 of Colorado Revised Statutes 1953, which shall not be repealed or amended other than in numbering districts, except that the counties of Cheyenne, Elbert, Kiowa, Kit Carson and Lincoln shall form one district, and one additional senator is hereby apportioned to each of the counties of Adams; Arapahoe, Boulder and Jefferson. Within a county to which there is apportioned more than one senator, senatorial districts shall be as nearly equal in population as may be.

Section 48. REVISION OF DISTRICTS. At the regular session of the general assembly of 1963 and each regular session next following official publication of each Federal enumeration of the population of the state, the general assembly shall immediately alter and amend the boundaries

of all representative districts and of those senatorial districts within any county to which there is apportioned more than one senator to conform to the requirements of Sections 45, 46 and 47 of this Article V. After 45 days from the beginning of each such regular session, no member of the general assembly shall be entitled to or earn any compensation or receive any payments on account of salary or expenses, and the members of any general assembly shall be ineligible for election to succeed themselves in office, until such revisions have been made. Until the completion of the terms of the representatives elected at the general election held in November of 1962 shall have expired, the apportionment of senators and represenatives and the senatorial and representative districts of the general assembly shall be as provided by law.

The ballot title and submission clause to the proposed initiative amendment to the constitution petitioned for herein as designated and fixed by the Secretary of State, Attorney General and Reporter of the Supreme Court is as follows, to-wit:

AN ACT TO AMEND ARTICLE V OF THE STATE CONSTITUTION PROVIDING FOR A SENATE OF 39 MEMBERS AND A HOUSE OF 65 MEMBERS; PROVIDES FOR 65 REPRESENTATIVE DISTRICTS TO BE SUBSTANTIALLY EQUAL IN POPULATION; FOR SENATORIAL DISTRICTS APPORTIONING SENATORS AS NOW PROVIDED BY LAW, AND ONE ADDITIONAL SENATOR IS APPORTIONED TO ADAMS, ARAPAHOE, BOULDER AND JEFFERSON COUNTIES; ELBERT COUNTY BEING DETACHED FROM ARAPAHOE COUNTY AND ATTACHED TO A DISTRICT WITH ADJOINING COUNTIES; PROVIDES FOR SENATORIAL DISTRICTS OF SUBSTANTIALLY EQUAL POPULATION WITHIN COUNTIES WITH MORE THAN ONE SENATOR; FOR REVISION OF DISTRICTS BY THE GENERAL ASSEMBLY IN 1963 AND AFTER EACH DECENNIAL CENSUS THEREAFTER, UNDER PENALTY OF LOSS OF COMPENSATION AND ELIGIBILITY OF MEMBERS TO SUCCEED THEMSELVES IN OFFICE.